109-665

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 118.

JAMES BENDEY AND CHARLOTTE BENDEY, APPELLANTS,

vs.

AMOS TOWNSEND AND WILLIAM BRIGHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 14, 1880.

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1 STATE OF MICHIGAN:

To the circuit court for the county of Baraga, in chancery:

Your orators, Amos Townsend and William Brigham, of the city of Cleveland, in the State of Ohio, respectfully show unto the court that on or about the first day of May, A. D. 1873, James Bendey, of said county of Baraga, did make and execute under his hand and deliver to Thomas W. Edwards six promissory notes for two thousand dollars each, payable, with interest, respectively, on the tenth day of June, July, August, September, October, and November following; three promissory notes for five thousand dollars each, payable, with interest, respectively one, two, and three years from said date; one note for two thousand five hundred dollars, payable, with interest, in thirty days from said date; and four notes for five hundred dollars each, payable, with interest, respectively August first next thereafter, November first next thereafter, and fifteen and eighteen months after said date, and all being made payable at the First National Bank of Houghton.

2. That said promissory notes were endorsed by Samuel L. Smith and William Harris, under the firm name of Smith & Harris, said Smith & Harris thereby rendering themselves liable as endorsers for the payment of said promissory notes.

2 3. That said James Bendey and Charlotte Bendey, his wife, on or about the thirtieth day of April, A. D. 1873, in order to secure said Samuel L. Smith and William Harris for their endorsement of said promissory notes, did execute under their hands and seals, and on the thirteenth day of May, A. D. 1873, did acknowledge and deliver, to said Samuel L. Smith and William Harris a certain indenture of mortgage, bearing date the said thirtieth day of April, A. D. 1873, and thereby, in consideration of the sum of one dollar to them paid, the receipt whereof was by the said indenture of mortgage duly confessed and acknowledged, and in *in* further consideration of the endorsement of said promissory notes, the parties of the first part in and to said indenture of mortgage did grant, bargain, sell, remise, release, alien, and confirm unto said Samuel L. Smith and William Harris, the parties of the second part in said indenture, and to their heirs and assigns, forever, all those certain pieces or parcels of land situated and being in the county of Baraga, then the county of Houghton, and State of Michigan, and described as follows, to wit: A piece or parcel commencing at the corner post of sections numbered twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), in township number fifty-one (51) north, of range number thirty-three (33) west;

3 thence south seventy-four (74) degrees fifteen (15) minutes east four hundred and fifty-seven (457) feet, to the shore of Keweenaw Bay; thence northerly along the shore of said bay ten and one-half (10½) rods to the section line, being the north boundary of fractional section thirty-four (34) of the same township and range; thence west along said line to the point of beginning, containing one and one-half acres, more or less. Another piece or parcel bounded and described thus: Commencing at the northwest corner of section thirty-four (34), in township fifty-one (51) north, of range thirty-three (33) west; running thence in a southeasterly direction to the shore of Keweenaw Bay, to a stake standing ten and one-half (10½) rods south of the northeast corner of said section thirty-

four (34); thence south along the shore of Keweenaw Bay, two hundred and thirty and one-half (230½) feet; thence in a northwesterly direction, running parallel with the first-described *described* line until it intersects the east and west line between sections twenty-eight (28) and thirty-three (33) of the same town. and range above mentioned; thence east along said line to the place of beginning; also the north half and the north half of the southwest quarter and the north half of the southeast quarter of section ten (10), in township fifty (50) north, of range thirty-four (34) west;

4 The foregoing being and being intended to be the same premises described in a deed bearing date May third, A. D. 1870, executed by the above-named James & Charlotte Bendey to Thomas W. Edwards, the same being recorded in the office of the register of deeds of the county of Houghton, in liber 13 of deeds, on page 119. Also the south half of the southwest quarter of section ten (10), the north half and the north half of the south half of section sixteen (16), in township fifty (50) north, of range thirty-four (34) west. Lots one (1), two (2), three (3), and four (4) in section sixteen (16), in township fifty-five (55) north, of range thirty-one (31) west; also lot five (5) and the northwest quarter of the southwest quarter and lot two (2) of section twenty-seven (27), in township fifty-one (51) north, of range thirty-three (33) west; also the following parcel situated in the county of Marquette, and State of Michigan, to wit: lot one (1), in section sixteen, in township fifty-two (52) north, of range twenty-nine (29) west, together with the hereditaments and appurtenances thereto belonging or in any wise appertaining.

4. Said indenture of mortgage was upon the express condition that the same should cease and be null and void if said James Bendey, one

5 of the parties of the first part therein, should and did pay, or cause to be paid, when due each and all of said promissory notes made by said James Bendey, and should and did save and keep harmless the said parties of the second part in said indenture of mortgage, viz, said Samuel L. Smith and William Harris, of and from all costs and damages arising from or on account of said endorsements, as in and by said mortgage, now in the possession of your orators and ready to be produced and proven as this court shall direct, reference thereto being had, will more fully appear.

5. The execution of said mortgage was, on the thirteenth day of May, A. D. 1873, duly acknowledged by the said James and Charlotte Bendey before Wm. H. Hendrick, a notary public in and for the said county of Houghton, duly authorized to take such acknowledgment, the certificate of said acknowledgment being duly endorsed on said mortgage.

6. That afterwards, to wit, on the seventeenth day of May, A. D. 1873, the said indenture of mortgage, together with the certificate of acknowledgment thereof, was in due form of law recorded in the office of the register of deeds in the said county of Houghton, in liber E of mortgages, on pages 223, 224, 225, and 226.

6 7. That said James Bendey did not pay the aforesaid promissory for the sum of five thousand dollars, payable in three years from the date thereof, nor any part thereof, nor the interest thereon; that the same was duly presented for payment, which was refused, and thereupon, on the fourth day of May, A. D. 1876, said promissory note was afterwards paid in full by said Samuel L. Smith and William Harris, all of which will more fully appear by reference to said promissory note and the certi-

ficate of protest attached thereto, now in possession of your orator and ready to be produced and proven as this court shall direct

8. That in the month of September, A. D. 1877, said Samuel L. Smith and William Harris were indebted in large sums of money to William Brigham, Henry C. Blossom, and John E. Green, of Cleveland, Ohio, copartners under the firm name of William Brigham & Co., and to William Edwards, Amos Townsend, J. Barton Parsons, Joseph W. Roof, and Norman W. Chamberlain, of Cleveland, Ohio, copartners under the firm name of Edwards, Townsend & Co., and in part payment of said indebtedness did, on the fifth day of September, A. D. 1877, duly assign, under their hands and seals, and grant, bargain, and sell, and transfer and set over unto your orators said indenture of mortgage in trust for said William Brigham & Co. and said Edwards, Townsend & Co.; that afterwards, on the

7 day and year last above mentioned, the execution of said assignment was duly acknowledged by said Samuel L. Smith and William Harris before James H. Seager, a notary public duly authorized to take such acknowledgment, the certificate of said acknowledgment being duly endorsed on said assignment.

9. That afterwards, to wit, on the 6th day of July, A. D. 1878, said assignment, together with the certificate of acknowledgment thereon, was in due form of law recorded in the office of the register of deeds of the county of Baraga, in liber A of mortgages, on pages 100 and 101, which assignment is now in possession of your orators and ready to be produced and proven as this court shall direct.

10. And your orators further show that there is now due and unpaid on the said promissory note and said indenture of mortgage the sum of six thousand eight hundred and seventy dollars; and in said mortgage it was agreed that should any proceedings be taken to foreclose said mortgage in chancery, upon the sale of said lands under such foreclosure your orators were authorized to deduct from such sale the sum of one hundred dollars as a solicitor's fee.

8 11. That no proceedings at law have been had to recover the debt secured by said mortgage and promissory note, or any part thereof.

12. That on the twenty-eighth day of June, A. D. 1876, said James Bendey did execute under his hand and seal, acknowledge, and deliver to Samuel L. Smith, William Harris, and James B. Smith, of the township of L'Anse, in said county of Baraga, copartners under the firm name of Smith & Co., another certain indenture of mortgage bearing date the day and year last aforesaid, and thereby, for the consideration of thirty thousand dollars to him paid, the receipt whereof was by the said indenture of mortgage duly confessed and acknowledged, did grant, bargain, sell, release, enfeoff, unto and confirm said Samuel L. Smith, William Harris, and James B. Smith the above-described lands, and also other lands, upon the express condition that said James Bendey should and did well and truly pay or cause to be paid the sum of thirty thousand dollars, with annual interest thereon, in five years from the date thereof, which mortgage was afterwards, to wit, on the twelfth day of December, A. D. 1876, duly recorded in the office of the register of deeds of said county of Baraga, in liber I of mortgages, on pages 36, 37, and 38.

9 13. That on the fifth day of September, A. D. 1877, said last

aforesaid mortgage was duly assigned by said Samuel L. Smith, William Harris, and James B. Smith to your orators in trust for said William Brigham & Co., and said Edwards, Townsend & Co.; that said assignment was duly acknowledged and was afterwards, to wit, on the sixth day of July, A. D. 1878, duly recorded in the office of the register of deeds of said county of Baraga, in liber A of mortgages, on pages 102 & 103.

14. Your orators expressly allege that they file this bill for the purpose of foreclosing the mortgage first herein above mentioned, subject to all their rights and interests in and to the second mortgage herein above described, and the right to foreclose the same when it shall have become due.

15. Your orators further show unto the court that they have caused examinations to be made of the records of deeds and mortgages in the office of the register of deeds of the counties of Baraga, Houghton, and Marquette, and from which said several examinations it appears, and your orators expressly charge the facts, that no other persons have or claim to have any rights or interests in the premises described in said indenture of mortgage, or in any part thereof, as subsequent purchasers, or incumbrances, or otherwise.

16. Your orators therefore ask the aid of this court in the premises, and that the above-named James Bendey and Charlotte Bendey, the defendants in this suit, may appear and *and* answer this your orators' bill without oath (their answers on oath being hereby expressly waived), and that they may come to a fair and just account touching the amount due to your orators upon said promissory notes and indenture of mortgage herein before mentioned and set forth.

17. And that they may be decreed to pay forthwith to your orators the amount which shall be found to be due to them thereon, and the interest thereon, together with your orators' reasonable costs and charges in this behalf sustained. And in default thereof that the defendants herein named, and each of them, and all persons claiming or to claim from or under them, may be foreclosed and barred of and from all equity of redemption of, in, and to said mortgaged premises, and every part and parcel thereof, with the appurtenances, and that all and singular the said mortgaged premises, with the appurtenances, may be sold by the order and decree and under the directions of this court, and the moneys arising from the sale thereof, so far as shall be necessary, or so far as the same shall extend, be applied towards satisfying to your orators the full amount of the moneys so as aforesaid secured in and by the said promissory note, and indenture of mortgage, both principal and interest, if the whole shall then be due and unpaid; or if the whole amount shall not be then due that such part of the said mortgaged premises as may be necessary to discharge the principal and interest moneys then found to be due to your orators thereon and unpaid, together with your orators' reasonable costs and charges, may be sold as aforesaid and the proceeds to be applied thereto as aforesaid; or in case it shall appear to this court that the said mortgaged premises are so situated that the sale of the whole will be more beneficial to the parties concerned, that then the whole of the said mortgaged premises, with the appurtenances, may be sold as aforesaid, and the proceeds of such sale be applied as well to the discharge of the principal and interest moneys then due and your orators' costs and charges as towards the whole or residue

of the amount secured by the said promissory note and indenture
12 of mortgage, and not due and payable at the time of such sale; after paying the sum due upon the said promissory note and indenture of mortgage, with your orators' costs and charges, to be put out at interest under the direction of this court for the benefit of your orators, to be paid to them as the remainder of said principal and interest moneys shall become due and payable, and the surplus, if any, for the benefit of the person or persons who may be entitled thereto; and that the said defendants and all persons claiming and to claim under them or either of them, or who have come into the possession of said mortgaged premises, or any part or portion thereof, during the pendency of this suit, deliver and yield up possession thereof to your orators, or to whomsoever shall become the purchaser or purchasers thereof at the said sale on his, her, or their producing to him or them or to the person or persons in the possession of said mortgaged premises, or any part thereof, the deed or deeds executed by the circuit court commissioner of said courts of Baraga, or by such other person as shall be authorized by the order of this court pursuant to such sale as aforesaid, and a certified copy of the order confirming the report of such sale after such order has become absolute.

13 And that the said James Bendey pay to your orator any balance that shall remain due to your orators of the principal and interest of said promissory note and indenture of mortgage if the sale of said mortgaged premises as aforesaid fail to produce sufficient to pay the whole of said mortgaged debt and the costs of this suit, and that in such case your orators have execution for the collection of such balances and the costs thereon according to the rules and practice of this court.

And that your orators may have such other and such further relief in the premises as shall be agreeable to equity and good conscience.

May it please the court, the premises being considered, to grant to your orators the writ of subpœna, to be issued out of and under the seal of this court, to be directed to the said James Bendey and Charlotte Bendey, defendants herein, and hereby commanding them and each of them on a certain day and under a certain penalty, to be therein inserted, personally to be and appear before this court, then and there to answer all and singular the said premises, and to stand to, and abide, and perform such or-
14 der and decree therein as this court shall make therein, as shall be agreeable to equity and good conscience.

And your orators will ever pray, &c.

CHANDLER & GRANT,
Sol'rs and of Counsel for Complainants.

CHANDLER & GRANT,
S'rs and of Counsel for Compl'ts.

Filed September 7th, 1878.

OSCAR J. FOOTE, *Register.*

15 *Subpœna.*

STATE OF MICHIGAN:

The circuit court for the county of Marquette. In chancery, to wit:

In the name of the people of the State of Michigan to James Bendey and Charlotte Bendey, greeting:

You are hereby commanded to appear before the circuit court for the

county of Baraga, in chancery, at the court-house in the village of L'Anse, on Thursday, the nineteenth day of September, A. D. 1878, then and there to answer unto a bill of complaint exhibited against you as defendants by Amos Townsend and William Brigham, trustees, as complainants. And this you shall in nowise omit under the penalty of one thousand dollars.

Witness the Hon. William D. Williams, circuit judge for the county of Baraga, at the village of L'Anse, the seventh day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

OSCAR J. FOOTE, *Register.*

CHANDLER & GRANT,
Solicitors for Complainants.

16 STATE OF MICHIGAN,
Baraga County, ss:

I hereby certify and return that on the ninth day of September, A. D. 1878, I served the within subpœna personally on James Bendey and Charlotte Bendey by delivering to each of said defendants a true copy of the within subpœna, inscribed copy, and subscribed Chandler & Grant, complainants' solicitors, and at the same time I showed each of said defendants the original subpœna, with the seal of the court impressed thereon.

JAMES JOHNS, *Sheriff.*

My fees: service, $2.50.

Filed October 10, A. D. 1878.

OSCAR J. FOOTE, *Register.*

17 Know all men by these presents that Claudius B. Grant and August Dallmeyer of Houghton, Houghton County, Michigan, are held and firmly bound unto James Bendey and Charlotte Bendy of Baraga, in the county of Baraga, and State of Michigan, in the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said James Bendey and Charlotte Bendey or to their certain attorney, heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and each and every of them firmly by these presents. Sealed with our seals; dated the seventh day of September, one thousand eight hundred and seventy-eight.

The condition of this obligation is such that if Amos Townsend and William Brigham, trustees, shall pay all costs that shall be decreed against them by the circuit court for the County of Baraga in chancery in a certain cause, wherein said Amos Townsend and William Brigham are complainants and said James Bendy are defendants then this obligation shall be void; otherwise it shall remain in full force and effect.

C. B. GRANT. [L. S.]
A. DALLMEYER. [L. S.]

I hereby approve the above bond.

OSCAR J. FOOTE, *Register.*

Filed Sept. 7th, A. D. 1878.

OSCAR J. FOOTE, *Register.*

18 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery. October 7th, A. D. 1878.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants, trustees, &c.,
vs.
JAMES BENDY AND CHARLOTTE BENDY, defendants.

On motion of Ball and Owen, solicitors for said defendants, James Bendy and Charlotte Bendey, ordered that the appearance of said defendants be, and the same is hereby, entered.

And on like motion it is further ordered that the complainants serve upon the said solicitors a copy of their bill of complaint, filed in this cause, within fifteen days after service upon them or their solicitors of notice of this order, or in default thereof that said bill be dismissed without costs.

OSCAR J. FOOTE, *Register.*

BALL & OWEN,
Solicitors for Def'ts.

Filed Oct. 7th, 1878.

OSCAR J. FOOTE, *Register.*

19 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

The demurrer of James Bendey and Charlotte Bendey, defendants, to the bill of complaint of Amos Townsend and William Brigham, complainants.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainants' bill to be true in manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such relief as is therein sought and prayed for from or against these defendants.

And these defendants, for further cause of demurrer, show that it is not alleged in or by said bill that the complainants or their cestus que trust are the owners of or have any interest in any claim or demand secured by the mortgage sought to be foreclosed, nor does it appear from said bill that the condition of said mortgage has been forfeited.

BALL & OWEN,
Sol'c'rs for Def'ts.

Filed November 4th, 1878.

OSCAR J. FOOTE, *Register.*

20 *Amendments to bill of complaint on demurrer.*

The circuit court for the county of Baraga. In chancery.

AMOS TOWNSEND AND WILLIAM BRIGHAM, trustees,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY.

At the close of clause seven write the following: "Nor did he save and keep the said Samuel L. Smith and William Harris harmless in and from all costs, charges, interest, and damages arising from and on account of said endorsement, but has therein wholly made default; and your orators aver that said Samuel L. Smith and William Harris were sued in the circuit court for the county of Houghton upon said promissory note by said Thomas W. Edwards, the payee of said note, on the 25th day of October, A. D. 1876, and that afterwards, to wit, on the tenth day of February, A. D. 1877, said Samuel L. Smith and William Harris paid said promissory note in full and the interest thereon and the costs and charges of said suit, and that by means thereof the condition of said mortgage was forfeited and said James Bendey became liable to said Samuel L. Smith and William Harris for the full amount of said note & the interest thereon and
21 the costs and charges of said suit so as aforesaid paid by them."

In the sixth line of clause marked "8," after the words "Wm. Brigham & Co.," insert the following, "to within about the sum of twenty-two thousand dollars."

In the tenth line of clause marked "8," after the words "Edwards, Townsend & Co.," insert the following, "in about the sum of fifty-three thousand dollars."

In the fifteenth line of clause marked "8," after the word "mortgage," insert the following, "and said promissory note."

In the seventeenth line of clause marked "8," after the words "Townsend & Co.," insert the following: "And did also sell, assign, and transfer unto your orators said indebtedness so as aforesaid due to said Samuel L. Smith & William Harris, and secured by said mortgage, to collect all monies due or to grow due thereon; to take all lawful means for the recovery thereof, and to divide and pay the same over to the said cestuis que trust according to their respective interests."

At the end of clause marked "9" insert the following:

"And your orators further show that they accepted said trust and are the holders and owners of said mortgage and said promissory note so
22 as aforesaid assigned to them by said Samuel L. Smith and William Harris, for the uses and purposes hereinbefore set forth; and that said Samuel L. Smith and William Harris have not paid to said William Brigham & Co., nor to said Edwards, Townsend & Co., the aforesaid sums of money so as aforesaid due to them respectively, nor any part thereof, but that said sums remain wholly due and unpaid."

In the first line of clause marked "ten," after the word "that," insert the following:

"Said James Bendey has not paid either to Samuel L. Smith and William Harris or to your orators the amount of said promissory note so as aforesaid paid by said Samuel L. Smith and William Harris, nor any

part thereof, nor the costs of said suit so as aforesaid brought by said Thomas W. Edwards against said Samuel L. Smith and William Harris; and that"

CHANDLER & GRANT,
Sol's for Compl'ts.

Filed November 14th, 1878.

OSCAR J. FOOTE, *Register.*

23 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

The answer of James Bendey, one of the defendants, to the amended bill of complaint of Amos Townsend and William Brigham, complainants.

This defendant, now and at all times hereafter saveing to himself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereto or to so much or such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says:

1. He admits the making and delivery of the promissory note for five thousand dollars, payable three years after the date thereof, as set forth in said bill of complaint, and says that he is advised that it is not material for him to answer in relation to the remaining notes set forth in said bill.

2. He admits that said promissory note was endorsed by said Samuel L. Smith and William Harris, as set forth in said bill.

24 3. He admits the execution and delivery of a mortgage at or about the time set forth in said bill to said Samuel L. Smith and William Harris, for the purpose of securing the payment of said note (among others) and of indemnifying said Smith and Harris upon their said endorsement; but he has not access to said mortgage and is unable to say whether its effect or provisions other than as above stated are correctly set forth in said bill; and he neither admits nor denies the same, but leaves the said complainants to their strict proof thereof, both as to the provisions of said mortgage and the property covered thereby.

4. He denies each and every of the allegations contained in the seventh paragraph of said complainants' bill; and he says that if the said promissory note was paid by the said Smith and Harris, it was with moneys in their hands belonging to this defendant, and that they soon afterwards received moneys belonging to this defendant sufficient to reimburse them for any payments they had made thereon and were wholly indemnified thereby, and the said mortgage thereby became and was void.

5. He is not advised in regard to the several matters set forth
25 in the 8th and 9th paragraphs of said bill of complaint, and he neither admits nor denies the same, but asks that the complainants may be required to make strict proof thereon.

6. He denies that there is due and unpaid on the said note and mortgage the sum of six thousand eight hundred and seventy dollars, or any other sum whatever, and he denies all other allegations in the 10th paragraph of said bill of complaint contained.

7. He denies the making, execution, and delivery of such mortgage as is set forth in the twelfth paragraph of said bill, but he is advised and alleges and insists that no foreclosure of the mortgage first in said bill set forth can lawfully be had or decreed subject to any such supposed secured mortgage, if any such should exist.

8. This defendant therefore prays to be herein dismissed with his reasonable costs by him in this behalf sustained.

JAMES BENDEY.

BALL & OWEN,
Solicitors for Defendants.

Filed December 26, 1878.

OSCAR J. FOOTE, *Register.*

26 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

The answer of Charlotte Bendey, one of the defendants, to the amended bill of complaint of Amos Townsend and William Brigham, complainants.

This defendant reserves all right of exception *for* said bill of complaint, and for answer thereto says: That she is not advised as to any of the matters alleged and set forth in said complainants' bill of complaint, and therefore she neither admits nor denies the same; and that she prays that said complainants may be required to make proof of all and singular of said matters so alleged; and she prays to be hence dismissed with her reasonable costs and charges by her in this behalf sustained.

CHARLOTTE BENDEY,
By BALL & OWEN,
Her Solicitors.

Filed December 15th, 1878.

OSCAR J. FOOTE, *Register.*

27 The circuit court for the county of Baraga. In chancery.

The replication of Amos Townsend and William Brigham, complainants, to the answer of James Bendey and Charlotte Bendey, defendants.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be taken to the manifold insufficiencies of the said answers, for replication thereunto say that they will aver, maintain, and prove this bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answers are uncertain, untrue, and insufficient to be replied unto by these repliants without this, that any other matter or thing whatever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which mat-

ters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as
28 in and by their said bill they have already praved.

CHANDLER & GRANT,
Solicitors for Complainants.

Filed December 27, 1878.

OSCAR J. FOOTE, *Register.*

29 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

AMOS TOWNSEND AND WILLIAM BRIGHAM
vs.
JAMES BENDEY AND CHARLOTTE BENDEY.

COUNTY OF MARQUETTE, *ss:*

It is hereby stipulated that Dan. H. Ball, of Marquette, in said county, may be substituted as solicitor for the defendants in the above entitled cause in the place of the firm of Ball & Owen, composed of said Dan. H. Ball and myself.

Dated January 8th, 1879.

ERNEST DALE OWEN.

The circuit court for the county of Baraga. In chancery.

AMOS TOWNSEND AND WILLIAM BRIGHAM
vs.
JAMES BENDEY AND CHARLOTTE BENDEY.

On reading and filing written consent therefor, and on motion of Messrs. Ball & Owen, solicitors for defendants in this cause, it is ordered
30 that Dan. H. Ball, esq., of the city of Marquette, in said county, be, and is hereby, substituted as solicitor for said defendants.

Dated January 30th, 1879.

BALL & OWEN,
Sol'crs for Def'ts.

OSCAR J. FOOTE, *Register.*

Filed January 30th, 1879.

OSCAR J. FOOTE, *Register.*

31 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

To the honorable the circuit court for the county of Baraga. In chancery:

The petition of James Bendey and Charlotte Bendey, of the township of Baraga, in the said county of Baraza, respectfully shows:

That your petitioners are defendants in this suit, and that the same was brought by Amos Townsend and William Brigham, complainants, on or about the seventh day of September, A. D. 1878, in the circuit court for the county of Baraga, in chancery, and that the said complainants were, at

the time of bringing this suit, and still are, citizens of Ohio; and that your petitioners were, at the time of bringing this suit, and still are, citizens of the State of Michigan, residents of said county of Baraga,
32 in the northern division of the western district of Michigan.

And your petitioners further show that there is, and was, at the time when this suit was brought, a controversy therein between citizens of the State of Ohio, to wit, the said complainnnts, and citizens of the State of Michigan, to wit, your petitioners, and further, that the said complainants claim in their bill, filed in this suit, as indebtedness against your petitioner, James Bendey, secured by the mortgage mentioned therein, the sum of six thousand eight hundred and seventy dollars, and that the matter in dispute in this suit therefore exceeds the sum of five hundred dollars exclusive of costs.

And your petitioners further show that this suit has not yet been tried, but the same is pending for trial in this court at L'Anse, in said county; and that there has as yet been no term of said court since the commencement thereof at which said cause could be tried; and that your petitioners desire to remove this suit before the trial thereof into the next circuit court of the United States, to be held in the northern division of the western district of Michigan, in the sixth circuit, in pursuance of the provisions of law as contained in the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of the circuit courts of
33 the United States, and regulate the removal of causes from State courts, and for other purposes."

And that they are ready and willing to give such good and sufficient surety as this court may direct, for the doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court; and they offer herewith a bond, executed by James Bendey, one of said defendants, as principal, and James P. Pendill, of the city of Marquette, in said district, as surety, in the penal sum of five hundred dollars, conditioned that your petitioners shall enter in the next term of the United States , to be held in the northern division of the western district of Michigan, in the sixth circuit, on the first day of its session, a copy of the record in this suit, and for paying all costs that may be awarded by such circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners therefore pray that the said bond may be accepted as good and sufficient surety according to the provisions of said statute, and that the said suit may be removed into the next circuit court of the United States, to be held in the northern division of the western district of Michigan, in the sixth circuit, pursuant to the statute of the
34 United States in such case made and provided, and that no further proceedings be had therein in this court, and your petitioners will ever pray.

JAMES BENDEY AND
CHARLOTTE BENDEY,
By BALL & OWEN,
Their Solicitors.

BALL & OWEN,
Solicitors and of Counsel for Defendants.

Filed January 29th, 1879.

OSCAR J. FOOTE, *Register.*

35 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

Know all men by these presents that we, James Bendey, of the village of L'Anse, in the county of Baraga and State of Michigan, as principal, and James P. Pendill, of the city and county of Marquette, in said State of Michigan, are held and firmly bound unto Amos Townsend and William Brigham, of Cleveland, in the State of Ohio, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Amos Townsend and William Brigham, or to their certain attorney, heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, and each and every of them, firmly by these presents. Sealed with our seals; dated the twenty-eighth day of January, one thousand eight hundred and seventy-nine.

36 The condition of this obligation is such that whereas the above-named Amos Townsend and William Brigham, on or about the seventh day of September, A. D. 1878, commenced a suit in chancery in the circuit court for the county of Baraga, in the State of Michigan, in chancery, against James Bendey and Charlotte Bendey, of said county of Baraga, and the same is now pending for trial in said court at L'Anse, in said county, and is removable into the circuit court of the United States for the northern division of the western district of Michigan, under the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;" and whereas the said James Bendey and Charlotte Bendey have filed their petition in said circuit court for the county of Bagara, in chancery, for the removal of said suit into the next circuit court of the United States to be held in the northern division of the western district of Michigan:

Now, therefore, the condition of this obligation is such that if the said James Bendey and Charlotte Bendey, or their legal representatives, shall enter or cause to be entered in the circuit court of the United States, on the first day of its next session, a copy of the record in said cause,

37 and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said cause was wrongfully or improperly removed thereto, and shall do or cause to be done such other appropriate acts as by the said act of Congress, approved March 3d, 1875, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and effect.

JAMES BENDEY. [SEAL.]
JAMES P. PENDILL. [SEAL.]

STATE OF MICHIGAN,
County of Marquette, ss:

James P. Pendill, the surety named in the foregoing obligation, being duly sworn, deposes and says that he is a resident of the State of Michigan, and is worth the sum of two thousand dollars over all just debts and liabili ties, in real estate subject to execution, in said county of Marquette.

JAMES P. PENDILL.

Subscribed and sworn to before me this 28th day of January, A. D. 1879.

CHARLES F. BRITTAN,
Notary Public in & for said County.

Filed January 29th, 1879.

OSCAR J. FOOTE, *Register.*

38 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

At a session of the said court, held at the court-house in the village of L'Anse, in said county, on the twenty-sixth day of February, A. D. one thousand eight hundred and seventy-nine.

Present, Hon. William D. Williams, circuit judge.

IN CASE OF
AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

On reading and filing the petition of the above-named James Bendey and Charlotte Bendey, defendants herein, for the removal of this suit into the circuit court of the United States for the northern division of the western district of Michigan, in the sixth circuit, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon filing the security by said defendants, according to the
39 requirements of said laws, and on motion of Dan. H. Ball, solicitor for the said defendants, it is hereby ordered that the said security be accepted, and the said suit be removed into the next circuit court of the United States, to be held in the said northern division of the western district of Michigan, and that no further proceedings be had in said suit in this court.

WM. D. WILLIAMS,
Circuit Judge.

40 STATE OF MICHIGAN:

The circuit court for the county of Baraga. In chancery.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

I, Oscar J. Foote, register of the circuit court for the county of Baraga,

in chancery, do hereby certify that the annexed is a true copy of the record in the above-entitled cause, that I have carefully compared the same with the original record thereof remaining in my office, and that it is a correct transcript thereof and of the whole of such record.

In witness whereof I have hereunto set my hand and official seal of said court at the village of L'Anse, in said county, this tenth day of March, A. D. 1879.

[SEAL.] OSCAR J. FOOTE, *Register.*

Filed May 6th, 1879.

GEO. SMITH,
Deputy Clerk U. S. Circuit Court.

41 urt of the United States for the western district of Michigan, northern division.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

It is hereby stipulated in the above-entitled cause that the testimony in said cause may be taken at Houghton, Houghton County, Mighigan, before A. K. Gray, esq., notary public, on the tenth day of February, A. D. 1880, and continued from time to time as may be necessary until completed.

It is further stipulated that said complainants shall put in their testimony within ten days from said date; that said defendants may have thirty days thereafter to put in their testimony and the complainants shall have twenty days to put in rebutting testimony.

Dated December 19th, 1879.

CHANDLER & GRANT,
Solicitors for Compl'ts.
DAN. H. BALL,
Solicitor for Defendants.

Filed December 24th, 1879.

GEO. SMITH, *Deputy Clerk.*

42 The circuit court of the United States for the western district of Michigan, northern division.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants. } In equity.

It is hereby stipulated in the above-entitled cause that testimony in said cause may be taken at Houghton, Houghton County, Michigan, before Jeremiah P. Finnegan, notary public, on the 6th day of May, A. D. 1880, and continuing from time to time as may be necessary until completed, that said testimony so taken may be produced and used on the hearing of

said cause subject to the same conditions and objections as if taken in open court; that each party shall have the right to produce and use additional testimony on the hearing of said cause; that said cause shall be brought on for hearing at the next term of said court held in the city of Marquette, on Tuesday, the 11th day of May, A. D. 1880, subject to the right of either party to move for a continuance or postponement for any cause.

Dated May 6th, 1880.

CHANDLER & GRANT,
Solicitors for Compl'ts.

DAN. H. BALL,
Solicitor for Def'ts.

43 EXHIBIT A.—JEREMIAH T. FINNIGAN, *Notary Public.*

This indenture, made this 30th day of April, A. D. 1873, between James Bendey and his wife, Charlotte Bendey, of the county of Houghton and State of Michigan, parties of the first part, and Samuel S. Smith and William Harris, the former a resident of the city of Lansing, in said State, and the latter of said county and State, parties of the second part, witnesseth:

That the said parties of the first part for and in consideration of the sum of one dollar to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, and in further consideration of the endorsement of certain promissory notes by the parties of the second part hereinafter more particularly mentioned and described, have granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell remise, release, alien, and confirm unto the said parties of the second part, their heirs and assigns forever, all those certain pieces or parcels of lands situate and being in the county of Houghton and State of Michigan, known and described as follows, to wit: A piece or parcel commencing at the corner post of sections numbered twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), in township number fifty-one
44 (51) north, of range number thirty-three (33) west; thence south seventy-four (74) degrees fifteen (15) minutes east four hundred and fifty-seven (457) feet to the shore of Keweenaw Bay; thence northerly along the shore of said bay ten and ond-half (10½) rods to the section line being the north boundary of fractional section thirty-four of the same township and range; thence west along said line to the point of beginning, containing one and one-half (1½) acres, more or less. Another piece or parcel bounded and described thus: Commencing at the northwest corner of section thirty-four (34) in township fifty-one (51) north, of range thirty-three (33) west, running thence in a southeasterly direction to the shore of Keweenaw Bay to a stake standing ten and one-half (10½) rods south of the northeast corner of said section thirty-four (34); thence south along the shore of Keweenaw Bay two nundred and thirty and one-half (230½) feet; thence in a northeasterly direction running parallel with the first described line two hundred (200) feet; thence north twenty-five (25) feet; thence in a northwesterly direction running parallel with the first described line until it intersects the east and west lines between sections twenty-eight (28) and thirty-three (33) of the same township and range above mentioned; thence east along said line to place of beginning. Also the north half and the north half

45 of the southwest quarter and the north half of the southeast quarter of section ten (10) in township fifty (50) north, of range thirty-four (34) west; the foregoing being, and being intended to be, the same premises described in a deed bearing date May 3d, 1870, executed by the above-named James and Charlotte Bendey to Thomas W. Edwards, the same being recorded in the office of the register of deeds of said Houghton County, in liber 13 of deeds, on page 119. Also the south half of the southwest quarter of section ten (10), the north half and the north half of the south half of section sixteen (16), in township fifty (50) north, of range thirty-four (34) west; lots one (1), two (2), three (3), and four (4), in section sixteen (16), in township fifty-five (55) north, of range thirty-one (31) west; also lot five (5), and the northwest quarter of the southwest quarter, and lot two (2) of section twenty-seven, in township fifty-one (51) north, of range thirty-three (33) west; also the following parcel, situate in the county of Marquette and State of Michigan, to wit: lot one (1) in section sixteen (16) in township fifty-two (52) north, of range twenty-nine west; together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to have and to hold the above bargained premises unto the said parties of the second part and to their heirs and assigns,

46 to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns forever.

Provided always, and these presents are upon the express condition that if the said James Bendey, one of the parties to the first part herein, shall pay or cause to be paid when due each and all of the following described promissory notes made by said James Bendey May 1, 1873, and endorsed by the parties of the second part herein, and payable to T. W. Edwards, to wit, six notes for two thousand (2,000) dollars each, payable, with interest, respectively on the 10th day of June, July, August, September, October, and November next; three notes for five thousand (5,000) dollars each, payable, with interest, respectively one year, two years, and three years from date; one note for two thousand five hundred, payable, with interest, in thirty days; and four (4) notes for five hundred dollars each, payable, with interest, respectively August first next, November first next, and fifteen and eighteen months after date, and shall save and keep harmless the said parties of the second part of and from all costs and charges arising from or on account of said endorsements, then these presents shall cease, and shall be null and void.

47 But in case of the non-payment of the said notes, or of either or of any of them, at the time, in the manner, and at the place in the same specified, then and in such case it shall and may be lawful for the said parties of the second part, their heirs, executors, administrators, and assigns, and the said parties of the first part do hereby empower and authorize the said parties of the second part, their heirs, executors, administrators, or assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his, her, or their heirs and assigns, ample and sufficient deed or deeds of conveyance in law pursuant to the law in such case made and provided, rendering the surplus moneys arising from said sale (if any there should be) to the said parties of the first part, their heirs, executors, or administrators, after deducting the costs

and charges of such vendue and sale aforesaid, and also one hundred dollars as an attorney fee, should any proceedings be taken to foreclose this indenture under the statute, and the same sum as a solicitor's fee,
48 should any proceedings be taken to foreclose the same in chancery.

And the said parties of the first part, their heirs, executors, administrators, and assigns, do covenant, grant, bargain, and agree to and with the said parties of the second part, their heirs and assigns, that at the time of the ensealing and delivery of these presents they were well seized of the above-granted premises in fee-simple, and that they are free from all encumbrances whatever.

And it is hereby expressly agreed by and between the said parties that should any default be made in the payment of the said notes, or of any one or more of them, when due and payable as therein expressed, and should it or they remain unpaid for the space of ten days, then and from thenceforth, that is to say, after the lapse of the said ten days, the said parties of the second part may foreclose this mortgage for the whole of said notes, whether due and payable or not on taking up the same.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES BENDEY. [L. S.]

her
CHARLOTTE + BENDY. [L. S.]
mark.

Signed, sealed, and delivered in presence of—
T. L. CHADBURNN,
JAMES PRYON,
Witnesses to signature of James Bendy.
D. D. HENDRICK.
EMMA BENDY.

49 STATE OF MICHIGAN,
County of Houghton, ss:

On this 13th day of May, A. D. 1873, before me, the subscriber, a notary public in and for said county, personally appeared James Bendey and Charlotte Bendey, to me known to be the same persons described in and who executed the foregoing instrument, who severally acknowledged the same to be their free act and deed; and the said Charlotte Bendey, wife of the said James Bendey, on a private examination by me, separate and apart from her said husband, acknowledged that she executed the same freely and without any force of or compulsion from any one.

[NOTARY SEAL.] WM. H. HENDRICK.

Exhibit A.—Jeremiah Finnegan, notary public.

50 EXHIBIT B.—JEREMIAH T. FINNEGAN, *Notary Public.*

$5,000.] HOUGHTON, MICH., *May 1st*, 1873.

Three years after date I promise to pay to the order of T. W. Edwards five thousand (5,000) dollars, value received, at the First National Bank of Houghton, with interest.

Due May 4.

JAMES BENDEY.

Rec'd on the within note $3,000 from G. C. Shelden, James P. Edwards, J. A. Ames and Mary E. Shelden.
Feb'y 10th, 1879.

T. W. EDWARDS.

Rec'd payment in full from Smith & Harris.
Feb'y 10th, 1877.

T. W. EDWARDS.

STATE OF MICHIGAN,
County of Houghton, ss:

Be it known that on the 4th day of May, in the year of our Lord one thousand eight hundred and seventy-six, at the request of the First National Bank of Houghton, I, James W. Raymond, notary public, duly admitted and sworn, dwelling in Houghton County and State aforesaid, did present the original , which is attached, at the First National Bank of Houghton, and demanded payment thereof, which was refused.

51 Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the maker and endorser of the said note as against all others whom it doth or may concern, for exchange or re-exchange, and all costs, charges, damages, and interests already incurred or to be incurred by reason of the non-payment of the said note.

And I, the said notary, do hereby certify that on the same day and year aforesaid due notice that said note had thus been present' for payment, and that payment thereof had been demanded and refused, and that the holders of said notes did and would look to the drawers, makers, and endorsers thereof for payment of the same; notices were put into the post-office at Houghton, with the full legal postage paid thereon, and directed as follows, after diligent enquiry being made for the residence of the drawers and endorsers, and not being able to ascertain it:

Notice for James Bendey directed Baraga, Mich.,
" " Smith & Harris at their office;

Each of the above-named places being the reputed place of residence of the person to whom the notice was directed, or for whom it was left as aforesaid.

[SEAL.] J. W. RAYMOND,
Notary Public.

Fees, 1.25; postage 4—$1.29.
Exhibit B.—J. T. Finniegan, notary public.

52 EXHIBIT C.—JEREMIAH T. FINNIGAN, *Notary Public.*

Assignment of mortgage.

Know all men by these presents that we, Samuel L. Smith, of Lansing, Ingham County, Michigan, and William Harris, of the county of Houghton and State aforesaid, of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid by William Brigham & Amos Townsend, trustees, of the second part, at or before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold,

assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over, unto the said part' of the second part a certain indenture of mortgage, bearing date the thirtieth day of April, one thousand eight hundred and seventy-three, made and executed by James Bendey and Charlotte Bendey, his wife, both of the county of Houghton and State of Michigan, to Samuel L. Smith & William Harris, the former a resident of the city of Lansing, in said State, and the other of said county and State, and recorded in the register's office of the county of Houghton, in liber E of mortgages, at pages 223, 224, 225, & 226, with all and singular the premises therein mentioned and described, together with the note or obligation therein also mentioned, and the moneys now due, and the interest that may hereafter grow due thereon; to have and to hold the same unto the part' of the second part, heirs and assigns forever, subject only to the proviso in the said indenture of mortgage mentioned. And we do hereby authorize and appoint the said part' of the second part our true and lawful attorney, irrevocable, in our name or otherwise, but at proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the sum or sums of money now due and owing, or hereafter to become due and owing, upon the said and mortgage, and in case of payment to give acquittance or other sufficient discharge as fully as might or could do if these presents were not made; and do hereby, for heirs, executors, and administrators, covenant, promise, and agree to and with the said part' of the second part that there is due upon the said and mortgage the sum of , and that we have good right and lawful authority to grant, bargain, and sell the same in manner aforesaid.

Sealed and delivered the day of , 187 .

SAM'L L. SMITH. [SEAL.]
WILLIAM HARRIS. [SEAL.]

In presence of—
JAS. H. SEAGER.
S. F. SEAGER.

53 STATE OF MICHIGAN,
County of Houghton, ss:

On this fifth day of September, A. D. one thousand eight hundred and seventy-seven, before me, a notary public in and for said county, personally appeared Samuel L. Smith and William Harris, to me known to be the person' described in and who executed the within instrument, and acknowledged the same to be their free act and deed.

JAS. H. SEAGER,
Notary Public.

(Indorsed:) Assignment of mortgage. Orig'l mortg. recorded in liber of mortgages, page .

REGISTER'S OFFICE, *County, ss:*

Received for record this day of , A. D. 187 , at o'clock m., and recorded in liber of mortgages, on page .

, *Register.*

54 EXHIBIT D.—JEREMIAH T. FINNIGAN, *Notary Public.*

JAMES BENDEY.

1874.					
April	1.	To statement rend	2,467	19	
May	22.	" p'd Saturs, his order	11		
		" telegrams	1	64	
	31.	" mdse	9	20	
June	30.	" "	26	90	
		" " to tug	28	63	
July	31.	" "	64	08	
		" " tug	7	60	
		" order A. Daziel	42		
		" " Trethom	4	50	
Aug.	31.	" " J. Rondrau	29	76	
		" mdse	76	99	
		" " tug	18	75	
Sept.	30.	" p'd court charges	33	30	
		" order to Wm. Matters	17	50	
	17.	" " " A. Bramede	192	90	
	30.	" mdse " tug	6		
		" "	111	08	
Oct.	31.	" order to P. Lesturge	20		
		" mdse	126	24	
		" " to tug	18	68	
Nov.	30.	" order to P. Howard	254		
		" " " Fred. Cox	67	24	
		" D. E. Washburn's bill	21	05	
		" Hans Haustrum Trenesf	19	03	
		" Mike Finnigan	108	12	
		" p'd sundry orders	87	50	
55	Nov.	30. To pd. L. Clinton	45	00	
		" mdse	191		
		" " to tug	10	18	
Dec.	31.	" order to Wm. Maher	39	42	
		" " " E. Jacques	100		
		" " " Superior Boiler W'ks	600		
		" mdse	111	64	
		" order to E. Thebo	64	20	
		" mdse	115	08	
		" T. M. Brady	10		
		" transfer to Smith & Co	5,000		
		" mdse	19	52	
Mch.		" order to E. Thebo	104	73	
		" mdse	81	35	
					$10,357 08
1874.					
May	20.	By cash from E. Lillie	221	40	
	30.	" " " Penobie	115	16	
Dec.	31.	" 2 Edwards' notes	10,000		
					10,336 56
1875.					
April	1.	To balance			$20 52

56 EXHIBIT E.—JEREMIAH T. FINNIGAN, *Notary Public.*

$5,000.00.] HOUGHTON, MICH., *May 1st*, 1873.

Five years after date I promise to pay to the order of T. W. Edwards five thousand dollars, value received, at the First National Bank of Houghton, with interest.

JAMES BENDEY.

57 EXHIBIT F.—JEREMIAH T. FINNEGAN, *Notary Public.*

James Bendey in % with Smith & Harris.

1875.				
April	1.	To bal. of % rendered	20	52
	10.	" order to Wm. Vaudin	120	
	30.	" pd. draft to Sales	90	
	29.	" " order " E. Thebeault	39	35
		" lumber " " "		96
	30.	" mdse	69	51
	31.	" collected from Mrs. Gedro	15	83
		" order to F. P. Fox	31	
		" " " E. Thebeaut	9	50
		" Mining Gazette bill	88	25
		" mdse. tug J. Ely	16	39
		" "	174	49
		" counter	6	95
June	7.	" cash	2	
	9.	" protest fees, &c	1	32
	14.	" cash to S. K. Day, order	15	
	15.	" " " John Hodgson "	29	72
	30.	" mdse. tug J. Ely	63	33
		" "	272	72
		" pd. Douglass House, order	6	
	15.	" pd. Superior Boiler Works 500; E. Thbeault 25.66	525	66
July	28.	" cash	1	
	31.	" pd. L. Clinton	42	
		" " Loher Bendey's order	5	50
		" " Norman White	10	
		" " A. Brownell	77	82
58	July	31. To p'd Fred. Droppreau	19	45
		" " Jacob Young	100	
		" " Eli Jacques	91	55
		" " E. P. Kibbie's bill	33	
		" mdse. tug J. Ely	37	34
		" "	145	09
Aug.	2.	" cash	5	
	18.	" " 2—5	7	
	25.	" "	5	
	28.	" "	5	

	30.	"	note paid.....	750	
		"	Superior Boiler Works.....	700	
		"	fr't & bill of Sear.....	142 85	
		"	p'd James Young's order.....	163 60	
		"	" J. C. Sullivan "	70	
		"	mdse. tug J. Ely.....	49 66	
		"	"	117 95	
Sept.	6.	"	cash, 2.00 (8); cash, 16.00.....	18 00	
	8.	"	p'd note.....		
	30.	"	" "		
		"	*to* M. W. Cameron, treas.....	1,061 15	
		"	A. Daziel, order.....	75	
		"	Fr. York "	12 80	
		"	mdse. tug J. Ely.....	52 66	
		"	"	126 69	
		"	John Schmidt, order.....	19 17	
Oct.	6.	"	p'd freight	15 48	
		"	" L. Christan.....	83	
59	Oct.	30.	To p'd interest on renewal.....	35 27	
			" " R. R. Goodell, order....	63	
		"	" S. F. Hodge "	117 32	
		"	" Mike Finnegan	175	
		"	lumber to tug.....	69	
		"	tug May E. Willis, transf'r.....	800	
		"	mdse. tug Ely.....	13 94	
		"	"	629 70	
Nov.	30.	"	C. Terangan's bill.....	20 80	
		"	Hibbard & Deschamp, order.....	6 10	
		"	freight.....	1 50	
		"	mdse. tug Ely.....	26 84	
		"	"	1,935 45	
		"	W. Vaudin, fr'ight.....	4,572 14	
		"	T. Richards, "	1,546 46	
					15,586 27
July	10.	By	proceeds of notes.....	1,480 02	
Aug.	18.	"	Calumet & Hecla, def't.....	1,621 62	
	27.	"	cash	1,000 00	
	31.	"	proceeds of 8400-note.....	396 33	
Nov.	30.	"	168 burlaps ret.....	50 40	
					4,548 37
					11,036 90

Mailed the above to J. Bendy, Baraga, Dec. , with delivered mdse. bills of tug Ely, & J. Bendey's %s.

60 EXHIBIT G.—JEREMIAH T. FINNEGAN, *Notary Public.*

JAS. BENDEY:

Oct. 1.	Statement rendered.....		479 50
	Tug Martin, trim'g.....	150	
	T. W. Edwards' note.....	3,000	

Notes	2,000	
Interest on notes	1,322 21	
Cost of suit	60	
Protest on notes	1 29	
Interest on notes	126 86	
		6,511 86
		$6,991 36

61 EXHIBIT G H.—J. T. FLANNIGAN, *Notary Public.*

HOUGHTON, MICH., *May* 1, 1875.

M. Jas. Bendey's lumber % to Smith & Harris, Dr.

1874.			
May 30.	By sales	441 64	
June 30.	" "	903 67	
July 31.	" "	768 96	
Aug. 31.	" "	1,036 55	
Sept. 30.	" "	1,320 92	
Oct. 31.	" "	1,989 54	
Nov. 30.	" "	1,492 96	
Dec. 31.	" "	216 80	
1875.			
Jan'y 31.	" "	80 09	
Feb'y 27.	" "	154 04	
Mar. 31.	" "	46 49	
April 30.	" "	261 14	
			8,712 80
1874.			
May 16.	To p'd laborers	4 00	
June 30.	" " "	33 90	
	" overch'ge on Robinson & Bro	16 04	
July 31.	" p'd laborers	41 52	
Sept. 30.	" " "	29 18	
Oct. 31.	" " "	18 75	
	" " "	23 62	
	" order to Dr. Grant	32 50	
	" " P. Harmon	40 00	
Nov. 30.	" " Chas. Smith	9	
	" labor, Oct. & Nov	108 74	
	" deduction on Penobie lumber	21 00	
62	" lumber ch'g'd, time	27 92	
	" transfer to Smith & Co	4,000 00	
1875.			
Feb. 27.	" " " " " "	1,000 00	
	" deduction to F. W. Anthony	5 60	
	" com. on sales, delivery, lumbermen in ch'g', &c	600 00	
			5,911 77
May. 1.	By balance		2,801 03

63 EXHIBIT H I.—JEREMIAH T. FINNEGAN, *Notary Public.*

HOUGHTON, MICH., *Dec.* 31, 1875.

M. J. Bendy's lumber % to Smith & Harris, Dr.

May	1.	By balance	2,801 03		
	31.	" sales	167 98		
June	30.	" "	414 74		
July	31.	" "	577 18		
Aug.	31.	" "	469 33		
Sept.	30.	" "	62 79		
Oct.	30.	" "	1,853 13		
Nov.	30.	" "	220		
Dec.	31.	" "	4,034 58		
					10,600 76
June	30.	To p'd order to J. Schmidt	24 91		
		" paid laborers	131 08		
July	31.	" " "	40 50		
Sept.	30.	" " "	21 20		
Oct	30.	" " "	2		
Nov.	30.	" rent Isle Royal Dock, 1874 & 1875	225		
		" laborers	3		
Dec.	31.	" "	38		
		" com'n on sales delivery, lumbermen in ch'g', &c	500		
					985 69
1876.					
Jan'y	1.	By balance			89,615 07

64 EXHIBIT J.—JEREMIAH T. FINNEGAN, *Notary Public.*

STATE OF MICHIGAN,
County of Houghton, ss:

OFFICE OF CLERK OF THE CIRCUIT COURT.

I, Thomas D. Meads, clerk of the circuit of said county, do hereby certify that the annexed are true and accurate copies of the original declaration, rule to plead, and order of discontinuance in a cause in said court wherein Thomas W. Edwards is plaintiff and Samuel L. Smith & William Harris are defendants, in my custody and keeping as such clerk; that I have carefully compared said copies said original files in my office and record of proceedings of said court, and that the same are true and accurate copies of said original and of the whole of the same.

In witness whereof I have hereunto set my hand and affixed the seal of the circuit court of said county this day of May, A. D. 1880.

[SEAL.] THOS. D. MEADS, *Clerk.*

65 *Declaration.*

STATE OF MICHIGAN,
County of Houghton, ss:

In the circuit court for the county of Houghton, of the day of , A. D. 187 .

Thomas W. Edwards, plaintiff herein, by J. O'Grady, his attorney, complains of Samuel L. Smith and William Harris, copartners in business under the firm-name of Smith & Harris, defendants herein, of a plea of trespass on the case upon promises, filing this declaration as commencement of suit by virtue of the statute in such case made and provided.

For that whereas the defendants, on the fourth day of May, A. D. 1876, at Houghton, in said county of Houghton, were indebted to the plaintiff in the sum of ten thousand dollars, for the price and value of goods then and there sold and delivered by the plaintiff to the defendants at their request.

And in a like sum for the price and value of work then and there done, and materials for the same, provided by the plaintiff for the defendants at their request.

And in a like sum for money then and there lent by the plaintiff to the defendants at their request.

And in a like sum for money then and there paid by the plaintiff to the defendants at their request.

And in a like sum of money then and there received by the defendants for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendants to the plaintiff on an account stated between them.

And thereupon the said defendants afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay him the said several sums of money, respectively, on request: Yet the said defendants have disregarded their said promises, and ha' not (although often requested so to do) paid any of the said sums of money, or any part thereof; to the plaintiff's damage of ten thousand dollars, and therefore he brings suit, etc.

J. O'GRADY,
Plaintiff's Attorney.

To the above-named defendant:

Take notice that on the trial of the above cause, the plaintiff under the money counts will give in evidence one certain promissory note, copy of which is given below.

J. O'GRADY,
Plaintiff's Attorney.

(Copy.)

$5,000.00.] HOUGHTON, MICH., *May 1st*, 1873.

Three years after date I promise to to the order of T. W. Edwards

five thousand (5,000) dollars, value received, at the First National Bank of Houghton, with interest.

No. . Due (May 4) in pencil.

JAMES BENDEY.

Endorsed:

SMITH & HARRIS.

66 STATE OF MICHIGAN,
County of Houghton, ss:

I hereby certify and return that on the 23rd day of October, 1876, I served the declaration, of which the within is a copy, on William Harris, one of the defendants named therein, and at the same time delivered to said Harris a copy for S. L. Smith, the other defendant named in said declaration, in said county of Houghton; and also at the same time delivered to him true copies of the foregoing promissory note and the notice relating thereto, together with a true copy of the notice to appear and plead, endorsed thereon as hereon endorsed.

Fees, $2.00.

B. SHEA, *Sheriff.*

(Indorsed:) No. . Circuit court, county of . Narr.

To the within-named defendant:

Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the book of common rules, kept by the clerk of said court, in his office, in the court-house in the village & county of Houghton, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule or judgment, etc.

Yours, etc.,

J. O'GRADY,
Plaintiff's Attorney.

Filed Oct. 25, A. D. 1876.

R. H. BRETSFORD,
Clerk.

67 STATE OF MICHIGAN:

The circuit court for the county of Houghton.

THOMAS W. EDWARDS
vs.
SAMUEL L. SMITH & WILLIAM HARRIS.

On filing declaration as commencement of suit in the above-entitled cause, pursuant to and in accordance with the statute made and provided and the rules and practice of this court, and on motion of J. O'Grady, esq., attorney for the plaintiff, it is ordered that the said defendants herein appear and plead to the said declaration within twenty days after service upon them of a copy thereof and notice of this rule or judgment, &c.

Dated October 23d, 1876.

J. O'GRADY,
Plaintiff's Att'y.

68 HOUGHTON, *Tuesday, February 13th*, 1877.

At a regular term of the circuit court for the county of Houghton, continued and held at the court-house in the village of Houghton, in said county, on Tuesday, the thirteenth day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable William D. Williams, circuit judge.

The court opened for business in due form.

THOMAS W. EDWARDS, PLAINTIFF,
vs.
SAMUEL W. SMITH AND WILLIAM HARRIS, DEFENDANTS. } Inquest under rule 99.

In this cause, by consent of counsel for both parties given in open court, it is ordered that this cause be, and the same is hereby, discontinued, with costs to the plaintiff to be taxed.

WILLIAM D. WILLIAMS.

69 The circuit court of the United States for the western district of Michigan, northern division.

AMOS TOWNSEND AND WILLIAM BRIGHAM,
complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY,
defendants. } In equity.

Testimony taken under and by virtue of the annexed stipulation before Jeremiah T. Finnegan, notary public, at Houghton, in said district, on the 6th day of May, A. D. 1880.

The complainants appear by Chandler and Grant, their solicitors, and the defendants by Dan. H. Ball, their solicitor, and the following proceedings were had, to wit:

Mortgage, dated April 30th, 1873, made by James Bendey and Charlotte Bendey, the defendants, to Samuel L. Smith and William Harris, with certificate of record endorsed thereon, offered in evidence by complainant, and hereto annexed, marked "Exhibit A."

Also, promissory note, dated May 1st, 1873, for five thousand dollars, made by James Bendey, payable to the order of T. W. Edwards,
70 and certificate of protest annexed thereto, produced and put in evidence by complainants, and hereto annexed, marked "Exhibit B."

(The certificate of protest is objected to as being incompetent by defendants' counsel.)

Also, an assignment of mortgage made by Samuel L. Smith and William Harris to complainants, with certificate of record endorsed thereon, offered in evidence by complainants, and hereto annexed, marked "Exhibit C."

WILLIAM HARRIS, a witness produced and sworn on behalf of complainants, testifies as follows:

My age is fifty-five years. I am a merchant by occupation and a member of the firm of Smith and Harris. I am one of the parties mentioned

in the mortgage Exhibit A, and also in the assignment of the mortgage Exhibit C. The firm of Smith and Harris endorsed for James Bendey, the note Exhibit B. The firm of Smith and Harris received notice of protest of said note. At the time of the assignment of this mortgage the firm of Smith & Harris were indebted to the firm of William Brigham & Co., of Cleveland. The indebtedness amounted to from twenty thousand to twenty-two thousand dollars. The firm of Smith & Harris were also indebted to the firm of Edwards, Townsend & Co. at the same
71 time in about the sum of fifty-three thousand dollars. I think the firm of William Brigham & Co. were composed of Mr. Brigham, Mr. Blossom, and Mr. Green. The firm of Edwards, Townsend & Co. were composed of Mr. Edwards, Townsend, Chamberlain, Roof, and Parsons. This mortgage was assigned to Messrs. Townsend and Brigham to apply on our indebtedness to the two firms. Smith & Harris payed the amount of Exhibit B to Thomas W. Edwards, the payee mentioned therein. They paid it with their own money. It was paid in February, 1877; February 10th, 1877. The exact amount which they paid was sixty-five hundred and some odd dollars. I can't tell the exact amount. Three thousand dollars of it was paid by T. W. Edwards assuming and endorsing it on the note, part of a judgment recovered by Prosper Roberts against the Portage Lake Bridge Co., and assigned by Prosper Roberts to Smith & Harris. The balance due was paid by two notes of Smith & Harris, seventeen hundred and fifty-five dollars each, given, to Edwards, which notes were afterwards paid by Smith & Harris June 10th and July 10th, 1877. Mr. Bendey, nor any one for him, has ever paid any part of this. Mr. Edwards sued Smith & Harris on Exhibit B in the circuit court for the county of Houghton. Smith & Harris settled it before judgment was ever entered.

Q. What were the costs of suit paid by Smith & Harris?

72 (Objected to by defendants' counsel as being incompetent.)

A. Sixty dollars. The amount of the protest fees was one dollar and twenty-nine cents.

Cross-examination by Mr. BALL:

Smith & Harris paid this note in the manner I have described, partly by a judgment held by the firm against the Portage Lake Bridge Company and partly by our own notes, which we afterwards paid.

Smith & Harris had at this time an open running account with James Bendey. When these payments were made they were charged up to Bendey on his account as money paid by Smith & Harris on this note. It still stands charged against him on Smith & Harris' books as a part of the balance against him.

Smith & Harris made a general assignment of all their effects March 26, 1878, for the benefit of their creditors, and afterwards went into bankruptcy on the 19th of April of the same year. All the assets of the firm of Smith & Harris were then turned over to an assignee in bankruptcy, including the account against Bendey.

Redirect by Col. GRANT, complainant's solicitor:

Mr. Smith resided during 1874, 1875, 1876, & 1877, at Lansing, Michigan. I had the main charge of the business here in Mr. Smith's
73 absence. Mr. Smith spent most of his time, I think, away. He

was generally here some portion of the summer months. Mr. Bendey never made any claim to me that he had paid this note in any way. He never claimed that he had moneys in the hands of Smith & Harris sufficient to pay it. We never had any conversation about the payment of the note.

WILLIAM HARRIS.

Taken, subscribed, and sworn to before me this 6th day of May, A. D. 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

JAMES H. SEAGER, a witness produced and sworn on behalf of the complainants, testifies as follows:

My age is 34 years; my occupation is a merchant, and my residence, Hancock, Michigan. I was formerly in the employ of Smith & Harris, from November, 1872, until July, 1875. I was present when note, Exhibit B, was paid or settled by Smith & Harris. The note was paid to Mr. Edwards by Smith & Harris. It was paid by Mr. Edwards assuming a portion of a judgment obtained by Prosper Roberts against the Portage Lake Bridge Company, which judgment was assigned to Smith & Harris, and the balance was paid by Smith & Harris' notes.

74 The total amount paid, six thousand five hundred ten dollars and thirty-six cents. The principal of the note was five thousand dollars. The interest was fourteen hundred and fifty-nine dollars and seven cents, and the costs claimed by Edwards were sixty dollars and the protest fees on the note were one dollar and twenty-nine cents. In pursuance of instructions from Mr. Smith and Mr. Harris, I closed the trade for Mr. Bendey's half interest in the steamer Ivanhoe to Mr. T. W. Edwards. The consideration of the interest was fifteen thousand dollars, which consisted of a promissory note surrendered by Edwards, made by Bendy to Edwards and endorsed by Smith & Harris, for the sum of five thousand dollars, due in May, 1875, and the further sum of ten thousand dollars in the shape of paper made by Edwards & Howe Bros. This sale was made the first part of November, 1874.

This last-mentioned ten thousand dollars was in two notes of five thousand dollars each. These notes were turned over to Smith & Harris. They were applied to the credit of Mr. Bendey's account with Smith & Harris at their face. This was at the time the sale was made, the first part of November, 1874. The three thousand dollars endorsed on the back of Exhibit B, as received from G. C. Shelden, James P. Edwards, and others, is the amount which was covered by the Roberts' judgment.

I don't know why these names were inserted, but it was the
75 amount assumed by Mr. Edwards on the judgment. There was a statement of account rendered to Mr. Bendey after the credit of this ten thousand dollars was given him on the books showing the credit.

(Defendants' counsel objects to the testimony of what the statement showed as incompetent.)

I have a letter-press copy of the statement so furnished.

Letter-press copy produced and offered in evidence, marked "Exhibit D," and hereto annexed.

(Objected to by defendants' counsel as incompetent.)

This statement was made out by Mr. Still, then book-keeper of Smith & Harris and myself. Mr. Bendey, made no objection to the statement to my knowledge. I have the note which was a part of the consideration for the purchase of Mr. Bendey's interest in the steamer Ivanhoe. The writing on the back of it is Mr. Harris' (note produced and put in evidence, marked "Exhibit E"). A question arose as to the interest on the note, and the note was not actually surrendered until some time after the sale.

Q. Who paid the interest on the note?

(Objected to as irrelevant by defendants' counsel.)

A. Smith & Harris.

76 Q. What was the amount of the interest they paid?

A. Five hundred and twenty-five dollars, eighteen months' interest had accrued up to the time of the sale, and the question that arose was whether the surrender of the note carried with it the interest or simply the face of the note. After the sale was made this note was in the possession of Howe Bros. While I was in the employ of Smith & Harris Bendey's account with them showed a large indebtedness in favor of Smith & Harris.

(Objected to by defendants' counsel as irrelevant.)

Cross-examination by Mr. BALL:

These two notes given by Edwards on the purchase of Bendey's interest in the steamer Ivanhoe were paid, and Smith & Harris realized the proceeds of them. All the Bendey notes held by Edwards and endorsed by Smith & Harris had been paid before the sale of Bendy's interest in the Ivanhoe to Edwards except the one surrendered as part of the purchase, price Exhibit E, and the five-thousand-dollar note due in three years, which was due May 1st, 1876, which is Exhibit B. I have no personal knowledge of the statement of which Exhibit D is said to be a copy having been delivered to Bendey, nor of its having been mailed to him.

77 The custom was to mail all statements of accounts to non-residents. Mr. Bendy lived at L'Anse. I can't say positively that I ever had any conversation with Mr. Bendey afterwards relative to this statement.

Redirect by Col. GRANT:

The conversations I afterwards had with Mr. Bendey relative to the sale of the Ivanhoe were mainly relative to the disputed interest on that note. Mr. Bendy claimed that the note should be surrendered, carrying the interest with it, and objected to the payment of the item of interest. That was the substance of the conversation. The custom was to mail these statements immediately after copying them.

JAS. H. SEAGER.

Taken, subscribed, and sworn to before me this 6th day of May, 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

RICHARD M. HOAR, a witness produced and sworn on behalf of complainant, testifies as follows:

My name is Richard M. Hoar; my age is 48 years; my occupation is merchant; my residence is Houghton, Michigan; I am one of the owners of the steamer Ivanhoe. T. W. Edwards owns a half interest in the Ivanhoe.

He purchased his interest from James Bendey. He purchased his
78 interest about five years ago. I was not present when Mr. Bendy and Mr. Edwards had any conversation in regard to the sale. In the trade I represented Mr. Edwards, and Mr. S. L. Smith represented Mr. Bendy, when we talked the sale over. The consideration agreed upon was fifteen thousand dollars. It was afterwards closed up on that consideration. This fifteen thousand dollars was to be paid as follows: Edwards was to give ten thousand (10,000) dollars of his own paper, endorsed by J. Howe & Bro. The balance of five thousand dollars was to be paid by Edwards surrendering a five thousand-dollar note which he held, made by James Bendey, and endorsed by Smith & Harris. Some time afterwards that note came into my possession. I held it for a number of months; I can't tell whether it was six months or a year; I think I got it before it became due. I think it remained in my hands until after it became due. I don't think it was protested. It lay in the safe in a large yellow envelope for a long time. I don't know why it was left with me in the first place. In fact I had forgotten about its being there. I suppose I got it from Mr. Edwards; I am not positive about that. There was a dispute about interest. (Witness shown Exhibit B.) I can't tell
79 whether or not that was the note that was left with me. It looked like that on the face, but there was no such writing on the back of it. It had the plain endorsement of Smith & Harris on it, with no protest attached to it. There was but one five-thousand-dollar note made by Mr. Bendey involved in that transaction that I know of.

RICHARD M. HOAR.

Taken, subscribed, and sworn to before me this 6th day of May, 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

GRAHAM POPE, a witness produced and sworn on behalf of complainants, testifies as follows:

My name is Graham Pope; my age is 39 years; my occupation is a merchant; residence, Houghton, Michigan; I am a member of the firm of Pope, Shepard & Co.; I have been connected with the firm of Smith & Harris since the early fall of 1875. During that time I know of statements having been furnished to Mr. Bendey by the firm of Smith & Harris. They were furnished monthly.

(Witness produced a letter-press copy of a statement furnished to Mr. Bendey at the close of the year, 1875. Copy offered in evidence. The copy is objected to *be* defendants' counsel as incompetent. Copies
80 marked "Exhibit F," and hereto annexed.)

I am not sure of monthly statements being sent prior to the spring of 1877, but after that I superintended the matter personally, and know that they were sent.

(Witness produced letter-press copy of statement furnished to Mr. Bendey the last of February, probably sent out the first of March.)

Q. Does this statement show the payment of Exhibit B by Smith & Harris?

(Objected to by defendant's counsel as incompetent.)

A. Yes, sir.

Q. Give the items that show it.

A. T. W. Edwards' note of three thousand dollars; note of two thousand dollars; interest on note thirteen hundred and twenty-two & $\frac{21}{100}$ dollars; costs of suit, sixty dollars; protest on note, one dollar and twenty-nine cents.

(Copy of statement offered in evidence and hereto annexed marked "Exhibit G." Objected to by defendants' counsel as being incompetent.)

Mr. Bendey's account ceased the fall of 1877; the close of that season. There may have been a few transactions during the following winter.

Q. About how much was Mr. Bendey then indebted to the firm?

81 (Objected to as incompetent by defendants' counsel.)

A. I can't say, because I have no personal knowledge that it included the branch concern of Smith & Co. at L'Anse. Including both accounts, it was something over thirty thousand dollars. Before the assignment made by Smith & Harris I was a clerk, having the overseeing of the accounts and collections. I spent the most of my time in the office, unless I was outside attending to the collections of accounts. Mr. Bendey was frequently in the store. I never heard him make any objections to the accounts rendered. He told me one time that his books did not agree with the statements rendered, and he sent his clerk up to look over the accounts, and I furnished his clerk, John W. Rice, with the statements he was short of. Since I have been there Mr. Bendey has always been in debt to the firm.

Cross-examination by Mr. BALL:

These statements of which I have given copies were not made out by me. They were made out by the book-keeper, Mr. Still, first, and Mr. Avery afterwards. I couldn't identify the sending of any one statement,

82 but I know it was the custom to send them, and I know that he received them from Mr. Rice bringing them back, except those he was short of. The firm of Smith & Company consisted of Samuel L. Smith, William Harris, and J. B. Smith. The firm of Smith & Company was a branch concern of Smith & Harris. Smith & Harris were receiving lumber of Bendy and selling it, and apply the proceeds upon this same account to a large amount. Smith & Harris sold goods to Bendey, paid notes and other indebtedness of his at his request, and charged them all and sales of goods upon this account, and credited him with receipts of sales of lumber and some other collections they had made. Whenever Smith & Harris paid notes for Bendy they retained them as vouchers. They never had a final settlement of this account that I know of. Never delivered over these vouchers that I know of. The firm of Smith & Harris consisted of Samuel L. Smith and William Harris.

Redirect by Col. GRANT:

Mr. Bendey's account begun in 1864, and kept right on down to the spring of 1878, until they made the assignment.

GRAHAM POPE.

Taken, subscribed, and sworn to before me this 6th day of May, A. D. 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

83 JAMES W. RAYMOND, a witness produced and sworn on behalf of complainants, testifies as follows:

In 1876 I was assistant cashier of the First National Bank of Houghton, and notary public. (Witness shown Exhibit B.) I protested this note; I sent a notice to Mr. Bendey; I put a notice in the post-office addressed to Mr. Bendey at Baraga; that was his P. O. address; I put a stamp on the envelope; Baraga is small place about 28 miles from Houghton.

J. W. RAYMOND.

Taken, subscribed, and sworn to before me this 7th day of May, A. D. 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

84 JAMES BENDEY, one of the defendants, being sworn on his own behalf, testifies as follows:

My name is James Bendey; my age is 57 years; my occupation is lumbering; my residence is Baraga, Baraga County, Michigan; I am defendant in this cause; I was formerly owner of a half interest in the steamer Ivanhoe, and sold it through Smith & Harris to T. W. Edwards; I authorized Smith & Harris to make the sale for me; it was at the request of Mr. S. L. Smith that I authorized them to make the sale; he said the Edwards' paper endorsed by Smith & Harris was pressing on them and by my consenting to the sale it would enable them to take care of the paper and help me likewise; I object' at first, but on Mr. Smith's pressing the matter I finally consented; Smith & Harris were handling my lumber at the time; I was engaged then in manufacturing lumber and they were my agents here for the sale of lumber; in objecting to the sale I told Mr. Smith that if I could get cash for my lumber I didn't think there would be any necessity of selling the Ivanhoe; he said the sale of the Ivanhoe would enable them to take care of the Edwards' note and help me
85 besides, or words to that effect; only the two Edward's notes for five thousand dollars each, with Smith & Harris endorsements, remained unpaid at that time with interest; no other agreement was made about the proceeds of the sale of the steamer Ivanhoe than that these notes were to be taken up and that a surplus would remain for me. From Mr. Smith's own statement made to me that the proceeds of the sale of the boat would enable them to take up these notes, I was led to believe this; that is the only reason that induced me to consent to the sale. I understood afterwards that the notes were paid; I only understood that this was done by the sale of the boat. Some time in the winter, after the sale of the boat, I asked Mr. Harris for those cancelled notes, and he told me when they had closed up matters they would send them down; they never applied to me to pay this last note to reimburse them that I have any recollection of; I first learned that a claim was made upon me for that note under the mortgage after this suit was commenced; when the suit was commenced I supposed it was a foreclosure of the mortgage on book account; before the suit was commenced I did not know
86 that Smith & Harris or any one claimed that this mortgage was in force, and when the suit was commenced I supposed it was for the foreclosure of the second mortgage given to Smith & Co.

Cross-examination by Col. GRANT:

I had no talk with Edwards about the sale of my interest in the Ivanhoe; I don't recollect any talk with Edwards; all my conversation was with S. L. Smith, I think; I don't know whether I had any with Segar; so far as the terms of the sale were concerned the talk was all with S. Smith; I authorized him to sell my interest to Edwards for fifteen thousand dollars, I think it was closed up by Segar, I mean the sale; Mr. J. H. Segar closed it up after Mr. Smith left; I only supposed this note was paid from the fact that Mr. Smith told me that Edwards was pressing, and by the sale the matter could be settled up, and it would help me; I consented with the understanding that it would stop interest, and that one matter would clear the other; I don't pretend to give the language that passed between me and Mr. Smith; I had no talk with Smith & Harris about this particular note except the talk I referred to when I
87 asked to have the cancelled notes returned to me; when I asked Mr. Harris to return the cancelled notes, I didn't mention any note in particular; this note wasn't mentioned by name or description, I think, any more than I referred to cancelled notes; I referred to the Edwards' notes; the notes that the Ivanhoe was sold to pay.

Q. Did you mention the Edwards' notes?

A. I rather think I did.

Q. You say that Smith & Harris had paid no other notes for you?

A. No, sir; I say there were no other notes to at that time that I know?

Q. To what time do you refer?

A. I refer to the time after the sale of the Ivanhoe when I sent him up here to settle up and get a statement and straighten up matters generally.

Q. Did not Smith & Harris at that time have other notes in their hands which they had paid for you?

A. I don't recollect; they may have had.

Q. When Smith & Harris paid notes for you it was their custom to charge them up in your account, was it not?

A. I believe so, from the statements which I saw.

Q. That was the usual way, wasn't it, of doing business between you?

A. Yes.

88 Q. You never said anything to either Smith or Harris about this note after the sale of the Ivanhoe, except to return those Edwards' cancelled notes?

A. No; I don't know that I did particularly.

Q. Can you tell what expression you used in talking to Mr. Harris that time about these notes?

A. No, sir; I don't recollect.

Q. Where was the conversation between you and Smith in regard to the sale of the Ivanhoe?

A. I think at L'Anse. I think we had more than one talk, but I am pretty sure the last talk was at L'Anse. I don't know but we may have had a talk up here about it.

JAMES BENDEY.

Taken, subscribed, and sworn to before me this 6th day of May, 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

WILLIAM HARRIS, a witness heretofore produced & sworn on behalf of complainants, on being recalled, testified as follows:

I first got possession of Exhibit E, February 15, 1878. I first got possession of Exhibit B, February 10, 1877. I don't remember ever having any conversation with Mr. Beedy in regard to these notes. Dur-
89 ing the winter after the Ivanhoe transaction neither of these notes were in the possession of Smith & Harris. I never informed Mr. Bendy or gave him to understand that Exhibit B was cancelled.

WILLIAM HARRIS.

Taken, subscribed, and sworn to before me this 7th day of May, 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

JOHN W. RICE, a witness produced and sworn on behalf of complainant' testifies as follows:

My name is John W. Rice. I am 49 years old. Residence, Houghton. I am deputy county treasurer; was formerly clerk for James Bendey. I went there the latter part of 1875, and remained during 1876 and up to about June or July, 1877. I had charge of his books up to May, 1877. Mr. Bendey was dealing during all that time with Smith & Harris, of Houghton, and Smith & Co., of L'Anse. Mr. Bendey sent me up here to look over the accounts of Smith & Harris. I looked over the accounts. I brought up statements with me from Mr. Bendey's books and
90 those that had been rendered by Smith & Harris. I think this was in May, 1876. I think I was here a portion of two days making the examination. We checked over all the items, with Mr. Pope. Smith & Harris rendered statements to Mr. Bendey every month. I judge so because I had the monthly statements right along. Mr. Bendey generally handed the statements to me. I think they always came directed to him. I found the books of Smith & Harris agreed with the statements they had rendered which Bendey had. There was a difference in the lumber account. Bendy had it charged directly to Smith & Harris, while they kept it seperate from the merchandise account. Smith & Harris rendered a lumber account seperate and a general account also. So far as I could see these books were correct. That is, taking their statements that were rendered, and so far as I knew about the transactions. Mr. Bendy kept a set of books. They were charged with the lumber account and previous to my going sometimes they were not credited and sometimes not with their accounts rendered. After I went there I credited them *them* up upon all bills rendered.

After giving them credit for the statements that had been made
91 and taking out the lumber account I found the books of Smith & Harris agreed with his or nearly so. Bendy gave me some accounts of Smith & Harris when I went there and I found others filed away. Mr. Bendy made no objection to any particular accounts rendered, but said "Damn the accounts, they are all wrong." That seemed to be his way. He never came there and looked the accounts over. He did not understand about the lumber. I think the lumber was the principal thing that he found fault with, and this was because he thought he did not get credit for enough lumber.

Cross-examination by Mr. BALL:

The lumber was charged when delivered to Smith & Harris; but they gave him credit for lumber that was sold. The lumber account and Bendey's general account were kept separate by Smith & Harris. (Exhibits F & D shown to witness.) I can't say whether these copies contain his lumber account; in regard to Exhibit F I can't say because that Calumet & Hecla draft may be for lumber; the cash may be for lumber; I don't know.

(Statement marked "Exhibit D" shown witness.)

Q. Does that include the lumber account?

92 A. I can't say positively in regard to the two credits of Seller & Penobri; that may be for lumber. I do not think that these statements contain the sales of lumber during the time covered by it, and neither does Exhibit F; neither of these two statements shown me contain the account of sales of lumber during the period covered by them.

(Two statements shown witness were dated May 1st, 1875, & December 31st, 1875, offered in evidence, and marked exhibits "H" & "I," and hereto annexed, identified by witness as lumber accounts of Smith & Harris, with James Bendy.)

Redirect:

A separate lumber account was rendered each month while I was there, and then a summary at the end of the year. It is my impression that at the time Pope and I looked over the accounts Bendy was not indebted to Smith & Harris in very large amount, but including Smith & Co.'s account he was indebted to a large amount.

Q. Was that Mr. Bendey's condition during all the time you were there?

(Objected to as immaterial by defendants' counsel.)

A. Yes.

JOHN W. RICE.

Taken, subscribed, and sworn to before me this 7th day of May, 1880.

JEREMIAH T. FINNIGAN,
Notary Public.

93 GRAHAM POPE, recalled on behalf of complainants, testifies as follows:

The lumber account was kept separate on Smith & Harris' books; Bendy was credited with the sales of lumber and charged with the expense of sale. Mr. Harris & James B. Smith told me that the net proceeds of the sales of lumber belonged to the L'Anse store. (Defendants' counsel objected to the statement of what Harris & Smith told witness, as incompetent.) Whenever the credit of the lumber account would warrant it transfers were made to the credit of Smith & Co., and the same item always appeared on Bendy's account.

Q. At the close of November, 1874, what was the amount of Bendey's indebtedness to Smith & Harris, including the branch store of Smith & Co.?

(Objected to by defendants' counsel as irrelevant and incompetent.)

A. I can only tell from figures taken from the books; more than twenty-three thousand dollars.

Cross-examination by Mr. BALL:

I think Smith & Harris had but a small amount of lumber on hand then belonging to Bendy.

GRAHAM POPE.

Taken, subscribed, and sworn to before me this 7th day of May, A. D. 1880.

JEREMIAH T. FINNIGAN,
Notary Public.

94 Certified copy of the record in the case of Thomas W. Edwards against Samuel L. Smith and William Harris, offered in evidence by complainant's counsel and hereto annexed, marked "Exhibit J."

JEREMIAH T. FINNIGAN,
Notary Public.

I, Jeremiah T. Finnigan, notary public, acting by virtue and in pursuance of the annexed stipulation, do hereby certify that on the 6th and 7th days of May, mentioned in the depositions hereto annexed, I was attended at Houghton, Houghton County, Michigan, by the counsel and witnesses aforesaid; that said witnesses were duly sworn and examined, and the depositions were reduced to writing and read to the witnesses, respectively, and by them respectively subscribed in my presence, and that Exhibits A, B, C, D, E, F, G, H, I, J, were introduced in evidence in said cause during the taking of said depositions.

Dated Houghton, Michigan, May 7th, A. D. 1880.

JEREMIAH T. FINNEGAN,
Notary Public.

Filed May 10th, 1880.

GOD. SMITH,
Deputy Clerk.

95 In the circuit court of the United States for the western district of Michigan, northern division.

AMOS TOWNSEND AND WILLIAM BRIGHAM
vs.
JAMES BENDEY AND CHARLOTTE BENDEY. } In equity.

It is hereby stipulated in the above-entitled cause that the deposition of Samuel L. Smith in said cause be taken in the city of Boston, in the State of Massachusetts, before any commissioner for the State of Michigan in said city; that the usual oath be administered to said Samuel L. Smith by said commissioner, and that said deposition when taken shall be sent by mail to Gad. Smith, deputy clerk of the circuit court of the United States for the western district of Michigan, northern division, at Marquette, Michigan, and that the said deposition shall be used in evidence on the trial of said cause, subject to the same conditions and objections as if the testimony of said Samuel L. Smith had been given in open court;

96 said deposition to be taken on interrogatories and cross-interrogatories hereto attached. But objections to said interrogatories or

cross-interrogatories for incompetency or irrelevancy are reserved, and may be made when said deposition is offered in evidence.

CHANDLER & GRANT,
Solicitors for Compl't.
DAN. H. BALL,
Solicitor for Defendants.

97 Interrogatories to be propounded to Samuel L. Smith under and by virtue of the annexed stipulation.

First interrogatory. What is your name, age, and occupation, and where do you reside?

Second interrogatory. Are you one of the mortgagees mentioned in a mortgage made by James Bendey and wife to Samuel L. Smith and William Harris, and dated April 30th, A. D. 1873?

Third interrogatory. Did you and William Harris assign said mortgage to William Brigham and Amos Townsend, trustee?

Fourth interrogatory. How much, if anything, did James Bendey pay to you or to Smith & Harris upon the note a copy of which is hereto annexed, marked Exhibit "A"?

$5,000.00.] HOUGHTON, MICH., *May 1st*, 1873.

Three years after date I promise to pay to the order of T. W. Edwards five thousand (5,000) dollars, value received, at the First National Bank of Houghton, with interest.

No. . Due .

JAMES BENDEY.

(Endorsed on back:)

SMITH & HARRIS.

Exhibit A.

98 Fifth interrogatory. Were you present at the sale of a part interest of the steamer Ivanhoe by James Bendey to Thomas W. Edwards? If so, state who was present, and what the terms of sale were.

Sixth interrogatory. If at said sale any arrangement or agreement was made in regard to any of the notes described in said mortgage, state what note or notes.

Seventh interrogatory. State what arrangement or agreement at said sale, if any, was made in regard to said Exhibit A.

Eighth interrogatory. Who paid Thomas W. Edwards the amount of the note marked "Exhibit A"?

Ninth interrogatory. If, in answer to the last interrogatory, you say that said note was paid by Smith & Harris state with whose money it was paid; and if you ever had any conversations with Bendey in regard to the payment of said Exhibit A, state fully the conversation and the time and place.

Tenth interrogatory. Did the money so paid or any part thereof belong to James Bendey?

99 Eleventh interrogatory. Did you or the firm of Smith & Harris,

after the payment of said note, receive any moneys belonging to James Bendey sufficient to reimburse them for such payment.

CHANDLER & GRANT,
Solicitors for Compl'ts.

100 Cross-interrogatories.

1st. If in answer to the eighth direct interrogatory you say that Smith & Harris paid to Edwards the amount of the note mentioned; state when you paid it, whether in money or in some other way, and whether all at one time or at different times, and give dates of all payments thereon.

2d. If Smith & Harris paid said note, did they at the same time receive it into their possession; and did they enter upon their books a charge or charges for such payment; and, if so, in what books?

3d. Did the firm of Smith & Harris ever have the said note in their possession until about the spring of 1878, shortly before making an assignment for the benefit of creditors and going into bankruptcy?

4th. If you testify of the sale of an interest in the steamer Ivanhoe, by James Bendey to Thomas W. Edwards, state the amount to be paid by Edwards and how it was paid. Did he not give two notes for $5,000 each, which were turned over to Smith & Harris and credited in
101 Bendey's account? And was not the remaining $5,000 paid by the note in question?

5th. If you state that Smith & Harris paid the note or any part of it, were you personally present at such payment, and at each payment that was made? When did such payment or payments take place and did you pay the amount to Edwards personally, or to some one for him? If to any other person than Edwards, to whom?

6th. Did you have much to do personally with the details of the business of Smith & Harris at that time? Was not the business at Houghton principally carried on by William Harris?

DAN. H. BALL,
Solicitor for Defendants.

102 In the circuit court of the United States for the western district of Michigan, northern division. In equity.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

STATE OF MASSACHUSETTS,
District of Massachusetts, County of Suffolk:

SAMUEL L. SMITH, witness called on behalf of the plaintiffs herein, and residing at Lansing, Michigan, but now a commonar of Boston, Massachusetts, each of said places being more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the truth, the whole truth, and being carefully examined, deposes and says as follows:

To the first interrogatory this deponent saith: My name is Samuel L. Smith; age, forty-nine; occupation, merchant; reside at Lansing, Michigan.

103 To the second interrogatory this deponent saith: I am.

To the third interrogatory this deponent saith: We did.

To the fourth interrogatory this deponent saith: Nothing to me, and am quite positive nothing to Smith & Harris.

To the fifth interrogatory this deponent saith: I made the sale to Edwards through R. M. Howe; made the terms to Mr. Howe myself, and on those terms the purchase was closed by Edwards. He was to give two time-notes of five thousand dollars each and surrender a five thousand dollar note of Bendey's, due Edwards the following May, for Bendey's half interest in the Ivanhoe.

To the sixth interrogatory this deponent saith: The agreement was made in November, and the Bendey note due Edwards on the 1st of May following was to be taken up in this sale—no other.

104 To the seventh interrogatory this deponent saith: There was no agreement or arrangement whatever in regard to note described in Exhibit A.

To the eighth interrogatory this deponent saith: My firm of Smith & Harris paid the note described in Exhibit A.

To the ninth interrogatory this deponent saith: It was paid with the money of the firm of Smith and Harris. I never had any conversation with Bendey, agreeing on the part of myself or my firm to pay this note. I conversed with him several times about his ability to meet this note, expressing some anxiety on account of our endorsement on it and liability to pay in case he did not. At one or two of these conversations he claimed that Edwards owed him on unsettled matters enough, as he thought, to cancel it if he could get an equitable settlement. I urged him to engage an attorney or some competent accountant to go over the matters between them and have it settled, so as to apply on this note. In none of these conversations did he claim I was to take care of this note. The time was previous to maturity of this note, but can't recollect each date or place. I met him often, and it was at these casual meetings that the

105 conversations were had.

To the tenth interrogatory this deponent saith: It did not.

To the eleventh interrogatory this deponent saith: No.

To the first cross-interrogatory this deponent saith: The dates and manner of payment were on the books of the firm of Smith & Harris, at Houghton, and I cannot give them here.

To the second cross-interrogatory this deponent saith: I think the note was held by R. M. Howe, subject to a difference of opinion as to who should pay the accrued interest on note that was to be taken up in Ivanhoe sale. This accrued interest was finally paid by us, and I believe the note was then taken up. This interest alluded to does not apply to note in Exhibit A. I think it was entered in our books, but cannot state what books.

To the third cross-interrogatory this deponent saith: The note was held for them from date of payment, and in our possession long before assignment. I think I put it in the hands of S. F. Seager, our attorney,

106 of Lansing, in September, previous to our assignment in March.

To the fourth cross-interrogatory this deponent saith: On two notes of five thousand dollars each, and in taking up the note of $5,000 due Edwards from Bendey a year previous to this note, described in Exhibit A. The two notes of $5,000 each were turned over to Smith & Harris to apply on his account. The remaining note described in Exhibit A there was no agreement on my part to pay in any way.

To the fifth cross-interrogatory this deponent saith: I was not present at the payment. It was made at Houghton by my firm. Cannot state if to Edwards or his agent or attorney or to whom.

To the sixth cross-interrogatory this deponent saith: I had a good deal to do with details of my business through correspondence and assistants whom I constantly directed when not on the ground myself. The business was carried on by William Harris, J. H. Seager, and Graham Pope; the latter two confidential assistants and clerks employed by me and representing me in the firm.

SAMUEL L. SMITH.

Subscribed and sworn to before me, Joseph B. Braman, a commissioner of the State of Michigan, in the State of Massachusetts, residing
107 at Boston, Mass., this tenth day of May, A. D. 1880.

[OFFICIAL SEAL.] JOSEH B. BRAMAN,
Commissioner of Michigan in Massachusetts, residing at Boston, Mass.

To the circuit court of the United States for the western district of Michigan, northern division, in equity:

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

STATE OF MASSACHUSETTS,
District of Massachusetts, County of Suffolk, ss:

I hereby certify that on Monday, the tenth day of May, A. D. 1880, before me, Joseph B. Braman, a commissioner of the State of Michigan in the State of Massachusetts, residing in Boston, Mass., at my office, No. 5 Court st., in the city of Boston, county of Suffolk, and State of Massachusetts, personally appeared before me, pursuant to the stipulation hereto annexed, between the hours of one and four of the clock in
108 the afternoon, Samuel L. Smith, the witness named in said stipulation, no counsel being present for either of the parties, and the said Samuel L. Smith being by me duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said, as appears by the deposition hereto annexed. And I further certify that the said deposition was then and there reduced to writing by me and was, after it had been reduced to writing, subscribed by the witness.

And I further certify that the reason why the said deposition was taken was that the said witness resides at Lansing, Michigan, more than one hundred miles from Marquette, Michigan, the place where the cause is to be tried, and because said witness is now a commoner of Boston, Mass.

And I further certify that the fees for taking said deposition, eight dollars, has been paid to me by the plaintiffs, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal, at the city of Boston, in the county of Suffolk, and State of Massachusetts, this tenth day of May, A. D. 1880.

109 [SEAL.] JOSEPH B. BRAMAN,
Commissioner of Michigan in Massachusetts, residing at Boston, Mass.

Due service of notice to produce the original statements, of which Exhibits D F and G are copies, is hereby admitted.

DAN. H. BALL,
Solicitor for Def'ts.

Filed May 15th, 1880.

GOD. SMITH,
Deputy Clerk.

110 *Statement of amount due.*

Principal & interest paid by Smith & Harris Feb'y 10, 1877:		
Principal	85,000	
Interest	1,449 07	
Protest	1 29	
		6,450 36
Interest from Feb'y 10, '79, to May 14, '80, 3 years 3 mos. 4 days, @ 7 %		1,472 44
		7,922 80
Costs paid	60 00	
Int. on same for 3 yrs. 3 mos. & 4 days	13 79	
		73 79
		7,996 59
Solicitor's fee provided in mortgage		100 00
Total		$8,096 59

111 At a session of the circuit court of the United States for the northern division of the western district of Michigan, continued and held pursuant to adjournment at the district court-room in the city of Marquette, on Monday, the seventeenth day of May, in the year one thousand eight hundred and eighty.

Present, honorable Henry B. Brown, judge of the eastern district of Michigan.

IN THE CASE BETWEEN AMOS TOWNSEND AND William Brigham, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants. } In equity.

This cause came on to be heard on the pleadings and proofs filed therein,

and after hearing Messrs. Chandler and Grant, solicitors for said complainants, and Dan. H. Ball, esq., solicitor for said defendants:

Thereupon it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree, that the said defendants pay or cause to be paid to said complainants, or
112 their solicitors, the sum of seven thousand nine hundred and ninety-six dollars and fifty-nine cents, together with interest thereon at the rate of seven per cent. per annum from the date hereof, and the sum of one hundred dollars adjudged by this court to be a reasonable solicitor's fee, and to be due and payable to said complainants in addition to the sum hereinbefore mentioned and costs, on or before the fifteenth day of June, in the year one thousand eight hundred and eighty, and that in default thereof all and singular the said mortgaged premises mentioned in said bill of complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount so as aforesaid found to be due said complainants, and interest from the date hereof, at the rate aforesaid, and said solicitor's fee and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of James E. Dalliber, master in chancery of this court, at any time after the said fifteenth day of June, in the year one thousand and eighty; that said sale be made in the county of Baraga and State of Michigan, that being the county where the greater part of the mortgaged premises are situated; that the said master give public notice of the
113 time and place of such sale, according to the course and practice of this court, and that the complainants or any of the parties in this cause may become the purchaser of the said mortgaged premises on such sale; that the said master, out of the proceeds of said sale, pay the expenses of said sale, and pay to the complainants or their solicitors their costs in this suit to be taxed, and the said solicitor's fee and the sum so as aforesaid found to be due said complainants, with interest thereon from the date hereof at the rate aforesaid, to wit, the sum of seven thousand nine hundred and ninety-six dollars and fifty-nine cents, or so much thereof as the proceeds of said sale will pay of the same; that the said master take receipts for the amount so paid and file the same with his report of said sale, and that he bring the surplus money arising from said sale, if any there be, into court without delay, to abide the further order of this court.

And it is further ordered that the said master execute a deed or deeds to the purchaser or purchasers at said sale, and that the purchaser or purchasers of said mortgaged premises at such sale be let into posses-
114 sion of said premises *our* any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of such master's deed for said premises, and a certified copy of the order confirming the report of said sale after said order has become absolute; and it is further ordered, adjudged, and decreed that the defendants and all persons claiming or to claim from or under them, or either of them, be forever barred and foreclosed of and from all equity of redemption in and to said mortgaged premises, and every part and parcel thereof.

And it is further ordered, adjudged, and decreed that if the moneys

arising from said sale shall be insufficient to pay the amounts so due to the complainants, with interest thereon as aforesaid, and the expenses of said sale, and said solicitor's fee and costs, that said master specify the amount of such deficiency in his report of said sale; and that on the coming in and confirmation of said report, the said defendant, James Bendey, who is personally liable for the debt secured by said mortgage, pay to said complainants the amount of such deficiency, with interest thereon at the rate aforesaid from the date of this decree, and that the complainants have execution therefor.

115 The description and particular boundaries of the property authorized to be sold, under and by virtue, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, are as follows, to wit:

All those certain pieces or parcels of land situate and being in the county of Baraga, formerly in the county of Houghton, and described as follows, to wit: A piece or parcel commencing at the corner post of sections numbered twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), in *in* township number fifty-one (51) north, of range number thirty-three (33) west; thence south seventy-four (74) degrees fifteen (15) minutes east four hundred and fifty-seven (457) feet, to the shore of Keweenaw Bay; thence northerly along the shore of said bay ten and one-half (10½) rods to the section line, being the north boundary of fractional section thirty-four (34) of the same township and range; thence west along said line to the point of beginning, containing one and one-half (1½) acres, more or less.

Another piece or parcel bounded and described thus: Commencing at the northwest corner of section thirty-four (34), in township fifty-one (51) north of range thirty-three (33) west, running thence in a southeasterly direction to the shore of Keweenaw Bay, to a stake standing ten and one-half (10½) rods south of the northeast corner of said section thirty-

116 four (34); thence south along the shore of Keweenaw Bay two hundred thirty and one-half (230½) feet; thence in a northwesterly direction, running parallel with the first described line, two hundred (200) feet; thence north twenty-five (25) feet; thence in a northwesterly direction, running parallel with the first described line until it intersects the east and west lines between sections twenty-eight and thirty-three (33) of the same town and range above mentioned; thence east along said line to the place of beginning.

Also the north half and the north half of the southwest quarter of section ten (10), in township fifty (50) north, of range thirty-four (34) west, the foregoing being the same described in deed bearing date May third, A. D. 1870, executed by James Bendey and Charlotte Bendey to Thomas W. Edwards.

Also the south half of the southwest quarter of section ten (10); the north half and the north half of the south half of section sixteen (16), in township fifty (50) north, of range thirty-four (34) west, lots (1), two (2), three (3), and four (4), in section sixteen (16), in township fifty-five (55) north of range thirty-one (31) west.

Also lot five (5), and the northwest quarter of the southwest quarter, and lot two (2), of section twenty-seven (27), in township fifty-one (51) north, of range thirty-three (33) west.

117 Also the following parcel of land, situated in the county of Margnette and State of Michigan, to wit: Lot one (1), in section sixteen (16), in township fifty-two (52) north, of range twenty-nine (29) west, together with the hereditaments and appurtenances thereunto belonging.

HENRY B. BROWN.

Countersigned:
GOD. SMITH, *Deputy Clerk.*

Filed and entered May 17th, 1880.

GOD. SMITH, *Deputy Clerk.*

118 In the circuit court of the United States for the western district of Michigan, northern division. In equity.

AMOS TOWNSEND AND WILLIAM BRIGHAM
vs.
JAMES BENDEY AND CHARLOTT BENDEY.

Complainants' taxed bill of costs.

Solicitors' fees by statutes	820 00
Commissioners' fees for taking testimony	18 00
Clerk's fee	12 50
Total	850 70

It is hereby stipulated in the above-entitled cause that the complainants' costs be taxed at the sum of fifty & $\frac{70}{100}$ dollars.

DAN. H. BALL,
Solicitor for the Defendants.

I hereby tax the complainants' costs at the sum of fifty dollars and seventy cents.
June 11th, 1880.

GOD. SMITH,
Deputy Clerk.

Filed June 11th, 1880.

GOD. SMITH,
Deputy Clerk.

119 The circuit court of the United States for the northern division of the western district of Michigan. In equity.

AMOS TOWNSEND AND WILLIAM BRIGHAM,
complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY.

To the honorable the Supreme Court of the United States:

The appeal of James Bendey and Charlotte Bendey, the above-named defendants, respectfully showeth:

That upon the seventh day of September, A. D. 1878, the above-named

complainants filed their bill in the circuit court for the county of Baraga, in chancery, of the State of Michigan, against the above-named defendants, appellants, for the purpose of foreclosing a certain mortgage executed by said defendants upon certain lands therein described to secure the payment of certain promissory notes, upon which there was then alleged to be due and unpaid the sum of six thousand eight hundred and seventy dollars, to which the said defendants answered denying that there was any sum due upon said notes and mortgage, and the said plaintiffs filed general replication thereto.

That said cause was afterwards duly removed to the circuit court of the United States for the northern division of the western district
120 of Michigan, in pursuance of the act of Congress in such case made and provided, and the words and proceedings were duly filed therein on the sixth day of May, A. D. 1879.

That proofs were afterwards taken in said cause and filed in said court, and on the seventeenth day of May, 1880, said cause was brought on for hearing in said court, at a session thereof held on that day, before the honorable Henry B. Brown, district judge of the eastern district of Michigan.

That on the seventeenth day of May, 1880, a final decree was made and pronounced in said cause, wherein it was in substance adjudged and decreed that there was due upon said notes and mortgages seven thousand nine hundred and ninety-six dollars and fifty-nine cents, and that these defendants pay the said sum, with interest and costs, and one hundred dollars as an attorney fee, on or before the 15th day of June, 1880, and that in default thereof the lands described therein be sold to satisfy said decree. Wherefore these appellants appeal from the whole of said decree of said circuit court of the United States, and respectfully pray that the decree of the said circuit court, and the bill, answers, pleadings, deposition, evidence, and proceedings in the said cause may be sent to the Supreme Court
121 of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made dismissing said bill with costs, or some other decree as to the said Supreme Court shall seem just.

Dated July second, A. D. 1880.

DAN. H. BALL,
Solicitor and of Counsel for Appellants.

Approval allowed.

H. B. BROWN,
District Judge.

Filed July 2, 1880.

GOD. SMITH,
Deputy Clerk.

122 Supreme Court of the United States.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants.

Know all men by these presents that we, James Bendey, of the county

of Baraga and State of Michigan, and Thomas W. Edwards, of the county of Houghton and State of Michigan, and James H. Blandy, of said county of Houghton, are held and firmly bound unto Amos Townsend and William Brigham, of the city of Cleveland, in the State of Ohio, in the sum of thirty-five hundred dollars ($3,500), to be paid to the said Amos Townsend and William Brigham, their executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and separately, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this third day of July, A. D. 1880.

Whereas the above-named James Bendey and Charlotte Bendey have taken an appeal to the Supreme Court of the United States to reverse the decree made and pronounced in the above-entitled action by the circuit court of the United States for the northern division of the western district of Michigan:

123

Now, therefore, the condition of this obligation is such that if the above-named James Bendey and Charlotte Bendey shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

In presence of—
DAN. H. BALL.

JAMES BENDEY. [SEAL.]
THOMAS W. EDWARDS. [SEAL.]
JAS. H. BLANDY. [SEAL.]

Approved.

H. B. BROWN.

Filed July 13, '80.

GOD. SMITH,
Deputy Clerk.

124 The United States of America to Amos Townsend and William Brigham, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the northern division of the western district of Michigan, wherein James Bendey and Charlotte Bendey are appellants and you are appellees, to show cause, if any there be, why the decree made and pronounced against the said appellants as in the said petition mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of July, in the year of our Lord one thousand eight hundred and eighty.

HENRY B. BROWN,
District Judge.

Filed July 13, 1880.

GOD. SMITH,
Deputy Clerk.

125 The Supreme Court of the United States.

AMOS TOWNSEND AND WILLIAM BRIGHAM, complainants and appellees,
vs.
JAMES BENDEY AND CHARLOTTE BENDEY, defendants and appellants.

We hereby acknowledge service on us of true copies of the claim for appeal and citation to appear and show cause in said cause, this 14th day of July, A. D. 1880.

CHANDLER AND GRANT,
Solicitors for Complainants.

Filed September 17, 1880.

GOD. SMITH,
Deputy Clerk.

126 UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan, northern division.

AMOS TOWNSEND AND WILLIAM BRIGHAM
vs.
JAMES BENDEY AND CHARLOTTE BENDEY.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Henry M. Hinsdill, clerk of the said court, do hereby certify that the foregoing is a correct transcript, compared by me, from the original records of the cause therein entitled, now remaining in my office and of record in said court, and of the whole of such original.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said circuit court, at the city of Marquette, in said county, this 29th day of September, A. D. 1880.

[SEAL.] HENRY M. HINSDILL, *Clerk*,
By GOD. SMITH, *Deputy*.

(Indorsement on cover:) No. 118. James Bendey & Charlotte Bendey, appellants, vs. Amos Townsend and William Brigham. W. Michigan C. C. U. S. Filed 14th October, 1880.

109-880

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1883.

JAMES BENDEY and
CHARLOTTE BENDEY,
Appellants.
vs.
AMOS TOWNSEND and
WILLIAM BRIGHAM.

No. 118.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Brief of C. I. Walker,

Attorney for Appellants.

The bill in this case was brought by the complainants as assignees of the firm of Smith & Harris, to foreclose a mortgage given by the defendants to indemnify the firm for indorsing certain notes executed by the defendant, James Bendey.

LEADING FACTS.

1st. On the 1st of May, 1873, the defendant, Jas. Bendey, executed to one T. W. Edwards, 14 notes for different amounts, payable at different times; and among them were three notes for $5,000 each, payable respectively in one, two and three years from date.

Bill, p. 1, § 1; answer, p. 9, §§ 1 and 2.

These notes, before their delivery, were indorsed by Smith & Harris, a firm of merchants, then doing business at Houghton, Michigan. And to secure them for their indorsements a mortgage was given upon the lands described in the bill, conditioned that the said Bendey should pay the several notes so mentioned "and shall save and keep harmless the said parties of the second part of and from all costs and charges arising from or on account of said indorsements."

Bill, p. 1, § 3; p. 9, § 3.
Mortgage, Ex. A., pp. 16-18.

2nd. There is no dispute but that all of these notes were paid by Bendey, or by Smith & Harris and charged to him, except the five thousand dollar note on three years time, which fell due May 4th, 1876.

Seager, p. 31; folios 74 and 77.

3rd. That note went to protest when due, and Smith & Harris were sued thereon on the money counts, by Edwards, the payee; and pending the suit and on the 10th of February, 1877, they paid the note to Edwards, who acknowledged the payment in full thereon.

Record of suit, pp. 25 and 28.
Note, indorsement and protest, Ex. B., pp. 50 and 51.

Harris, p. 29 ; fol. 71.
Seager, p. 30 ; fol's 73 and 74.
Smith, p. 41 ; fol. 104.

4th. This bill is brought to foreclose the mortgage referred to, by the complainants, who claim to be the assignees of Smith & Harris, under an assignment dated September 5, 1877.

Ex. C., pp. 19 and 20.

The bill is somewhat peculiar in its averments. It first avers that Bendey did not pay the note, that it went to protest, and afterwards it was paid in full by Smith & Harris.

Record, pp. 2 and 3 ; fol. 6.

It subsequently avers that Bendey did not save them harmless; that suit was brought against said Smith & Harris on said note, and that on the 10th day of February, 1877, they paid the same with costs and charges, and thereby Bendey became liable to pay them the amount thus paid.

Amendment to bill, p. 8; folio 20.

It further avers the assignment of said note and mortgage in trust to complainants, and the indebtedness secured thereby, and that there is now due and unpaid on said promissory note assigned and said indenture of mortgage, the sum of six thousand eight hundred and seventy dollars, and that said Bendey has not paid the same or the costs of said suit.

Bill p. 3; §§ 8, 9 and 10; folios 6-8.
Amendment, p. 8; folios 21 and 22.

And the prayer of the bill is that the defendants may come to an account touching "the amount due to

your orators upon said promissory notes and indenture of mortgage," and that they may be paid "the amount secured by said promissory note and indenture of mortgage," and that the defendant Bendey shall pay any balance remaining due "of the principal and interest of said promissory note and indenture of mortgage if the sale of said mortgaged premises, as aforesaid, fail to produce sufficient."

Record pp. 4 and 5; folios 10--13.

It will be seen, therefore, that the bill is brought specifically to recover the amount due upon the note in question, and not to foreclose the mortgage upon the general condition of the saving and keeping said Smith & Harris harmless because of said indorsements.

One question is, therefore, whether, at the time of the assignment of said note and mortgage by Smith & Harris to complainants, said note still remained due and unpaid and was an existing valid obligation against Bendey.

The defendants claim that the note had ceased to exist as a valid obligation against Bendey, and that the mortgage securing it was therefore discharged.

I.

We say that, although the note in question was not paid by Smith & Harris to the holder until the 10th of February, 1877, it was then paid under an agreement previously made with Bendey and for which they received a full consideration.

Bendey owned an interest in the steamer Ivanhoe, and at the request of Smith & Harris sold it for $15,000, on purpose to place them in funds to meet these

notes on which they had become indorsers; and they received the proceeds of this sale and were bound to pay the note in question.

Bendey, pp. 34 and 35.

Upon this point the testimony is in serious conflict, complainants claiming that only the two years' note was paid under this arrangement; and that, while Smith & Harris received from the purchaser of said boat ten thousand dollars in addition to the two years' note, that amount was credited to Bendey upon his account, and that he had the full benefit of said sale.

Seager, p. 30, fol. 74 and p, 31 ; fol. 76.
Hoar, pp. 31 and 32 ; fol. 78.
Smith, p. 41 ; fol. 103--5.
Ex. D., p. 21.

But it is not very important what decision is arrived at upon this point, as upon other points we submit the defense is perfect.

II.

Even if Smith & Harris paid said note to Edwards from their own funds, and without any special arrangement with Bendey, that payment extinguished the note.

It is entirely clear that the indorsement of Smith & Harris was made before the note was delivered to the payee Edwards, and for the purpose of giving it credit.

The note was never indorsed by Edwards or in any way transferred by him. There could therefore be no regular indorsement.

2 Parsons' Notes and Bills, pp. 2 and 3.

And the bill and the mortgage both show that the notes were delivered to Edwards subsequently to the indorsement ; and complainants' testimony shows that Smith & Harris indorsed the note for James Bendey.

Bill, p. 1 ; §§ 1 and 2.
Ex. A., p. 16.
Harris, p. 29 ; fol. 70.

Under these facts Smith & Harris, as between themselves and the payee, were joint makers with Bendey; while as between themselves and Bendey they were sureties.

Wetherwax vs. Perrin, 2 Mich., 555.
Rothschild vs. Grex, 31 Mich., 150.
Ray vs. Simpson, 21 How., 341 and 350.
Good vs. Martin, 95 U. S., 90 and 94.

Both parties acted upon this basis, and when the money was paid by Smith & Harris to Edwards the latter indorsed it as a full payment on the note; while Smith & Harris immediately charged the amount to Bendey in general account, simply holding the note as a voucher.

Ex. B, pp. 18 and 19.
Harris, p. 29 ; fol. 72.
Pope, p. 33 ; fol. 82.
Bendey, p. 35 ; fol. 87.
Ex. G., pp. 23 and 24 ; fol. 68.

Under these circumstances the only remedy of Smith & Harris was to sue Bendey for money paid, or to foreclose the mortgage for a breach of the indemnity clause, viz :—"shall save and keep harmless the said parties of the second part of and from all costs and charges arising from or on account of said indorsement, then these presents shall cease and be null and void."

1 Parsons, 243, note.
Mortgage, Ex. A., p. 17 ; fol. 46.

Instead of that, the mortgage is sought to be foreclosed upon the theory that the note is still an existing claim and has been transferred to the complainants by Smith & Harris.

We submit that the evidence does not sustain the theory of the bill, and that the decree is erroneous.

The question whether the note is still an existing outstanding obligation is a very different one from the question whether Smith & Harris have been saved harmless on account of their having as makers and sureties paid that note.

III.

But independently of this question, we submit that the evidence shows very clearly that the note in question is not only entirely extinguished, but that the mortgage itself is discharged, and if Bendey owes Smith & Harris, or their assignees, it is upon general account.

This extinguishment grows out of the business relations between the parties and the state of their accounts. Bendey was a lumberman, engaged in the manufacture of lumber at Baraga, Michigan, and Smith & Harris were merchants at Houghton, and sold lumber to a large amount for Bendey, and also sold him goods. These accounts had been running for many years, namely, from 1864 to 1878, and covered a large amount of money.

Pope, p. 33, fol. 82.
Exs. D, p. 21; F, p. 22; G H, p. 24; H I, p. 25.

Although these exhibits cover but a very small part of the time mentioned they indicate somewhat

the extent of the business carried on. Not only were there accounts between Smith & Harris and Bendey, but there was a firm known by the name of Smith & Co., composed of the two members of the firm of Smith & Harris and another man by the name of Smith, and doing business at L'Anse. But this company was a branch concern of Smith & Harris, and the accounts were intermingled, as is entirely clear from the testimony.

Pope, p. 33 ; fols. 81 and 82, and p. 37 ; fol. 93.

It was unquestionably to secure the balance on the accounts that the mortgage to Smith & Co., set up in the bill, was executed, it being to secure a book account.

Bill, p. 3 ; § 12.
Bendey, p. 34 ; fol. 86.

The evidence tends to show that at times there was a large balance due from Bendey to one or both the firms, although upon this point the complainants' witnesses are in conflict ; while at times the balance was the other way.

Seager, p. 31 ; fol. 76.
Pope, p. 33 ; fol. 81.
Rice, p. 37 ; fol. 92.
Exhibit G H & G J, pp. 24-5.

One thing is entirely clear : that whenever Smith & Harris paid any notes for Bendey they were charged in this general account between the parties, and the notes were held as vouchers merely ; and the very note in question stands charged to him to day on the books of that firm as a part of the general account.

Thus, Wm. Harris, one of the firm of Smith & Harris, testifies :

"Smith & Harris had at this time an open running "account with James Bendey. When these pay- "ments were made they were charged up to Bendey "on his account as money paid by Smith & Harris on "this note. It still stands charged against him on "Smith & Harris' books as a part of the balance "against him."

Record, p. 29; fol. 72.

Pope, the bookkeeper of Smith & Harris, and financial agent, testifies as follows:

"Smith & Harris were receiving lumber of Bendey "and selling it, and applying the proceeds upon this "same account to a large amount. Smith & Harris "sold goods to Bendey, paid notes and other indebt- "edness of his at his request, and charged them all "and sales of goods upon this account, and credited "him with receipts of sales of lumber and some other "collections they had made. Whenever Smith & "Harris paid notes for Bendey they retained them as "vouchers. Never delivered over these vouchers that "I know of."

Record, p. 33; fol. 82.

Bendey, on cross-examination, in answer to questions by complainants, testifies as follows:

"Q. Did not Smith and Harris at that time have "other notes in their hands which they had paid for "you?

"A. I don't recollect; they may have had.

"Q. When Smith and Harris paid notes for you "it was their custom to charge them up in your ac- "count, was it not?

"A. I believe so, from the statements which I "saw.

to save Smith & Harris harmless on account of said indorsements, the mortgage can be foreclosed.

Ex. A, p. 17; fols. 46 and 47.

There being no personal obligation on the part of Bendey, the only security of Smith & Harris was the mortgage.

If Smith and Harris had paid the note in question out of their own funds, and without any special agreement to pay the same, and if such payment had not been charged in general account so as to form a part and parcel thereof, they or their assignees could have foreclosed the mortgage and have sold sufficient of the property to indemnify them for the money paid; but they would not be entitled to a personal decree for the deficiency, if any there should be.

The decree, however, finds that Bendey is personally liable for the debt secured by said mortgage, and orders that he shall pay the amount of the deficiency, if any there be.

Decree, p. 45; fol. 114.

We submit that upon this point the decree is clearly erroneous.

We claim therefore that the decree is erroneous both upon the points affecting the whole decree and those affecting its details, and should be reversed

C. I. Walker.
Attorney for Appellants.

109-665

OFFICE SUPREME COURT U.S.
NOV 12 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

October Term, 1883.

JAMES BENDEY and CHARLOTTE BENDEY,
APPELLANTS,
vs.
AMOS TOWNSEND and WILLIAM BRIGHAM.
No. 118.

Statement and brief on behalf of Appellees.

STATEMENT.

This is a foreclosure case. The bill of complaint was filed in the Circuit Court for the County of Baraga, in the State of Michigan, September 7, 1878—the answer December 26, 1878. On the 26th day of February, 1879, the suit was removed on the petition of the defendants to the Circuit Court of the United States for the western district of Michigan. The case was heard on pleadings and proofs. A decree of foreclosure and sale of the mortgaged property, according to the prayer of the bill, was filed in said last-named Court on the 17th day of May, 1880. From that decree the defendants appeal to this Court.

The mortgage in question bears date April 30, 1873. It was given by the appellants to Samuel L. Smith and William Harris, and by them assigned to Townsend and Brigham. The consideration of said mortgage is stated as "one

"dollar" * * * "and in further consideration of the "endorsement of certain promissory notes by the parties of "the second part, hereinafter more particularly mentioned "and described."

The conditions of the mortgage are as follows:

"Provided always, and these presents are upon the ex- "press condition, that if the said James Bendey, one of the "parties to the first part herein, shall pay or cause to be "paid, when due, each and all of the following-described "promissory notes made by the said James Bendey May 1, "1873, and endorsed by the parties of the second part here- "in, and payable to T. W. Edwards, to wit, six notes for "two thousand ($2,000) dollars each, payable with interest, "respectively on the 10th day of June, July, August, Sep- "tember, October, and November next; three notes for five "thousand ($5,000) dollars each, payable with interest, re- "spectively one year, two years, and three years from date; "one note for two thousand five hundred, payable with in- "terest in thirty days, and four (4) notes for five hundred "dollars each, payable with interest, respectively, August "first, next, November first, next, and fifteen and eighteen "months after date, and shall save and keep harmless the "said parties of the second part of and from all costs and "charges arising from or on account of said endorsements, "then these presents shall cease, and shall be null and void.

"But in case of the non-payment of the said notes, or "of either or of any of them, at the time and in the manner "and at the place in the same specified, then and in such "case it shall and may be lawful for the said parties of the "second part, their heirs, executors, administrators, and "assigns, and the said parties of the first part do hereby "empower and authorize the said parties of the second "part, their heirs, executors, administrators, or assigns, to "grant, bargain, sell, release, and convey the said premises, "with the appurtenances, at public auction or vendue, and "on such sale to make and execute to the purchaser or "purchasers his, her, or their heirs and assigns, ample and "sufficient deed or deeds of conveyance in law, pursuant to

" the law in such case made and provided, rendering the " surplus moneys arising from said sale (if any there should " be) to the said parties of the first part, their heirs, execu- " tors, or administrators, after deducting the costs and " charges of such vendue and sale aforesaid, and also one " hundred dollars as an attorney fee, should any proceed- " ings be taken to foreclose this indenture under the statute, " and the same sum as a solicitor's fee, should any proceed- " ings be taken to foreclose the same in chancery."

* * * * * * *

" And it is hereby expressly agreed by and between the " said parties that should any default be made in the pay- " ment of the said notes, or of any one or more of them, when " due and payable as therein expressed, and should it or they " remain unpaid for the space of ten days, then and from " thenceforth, that is to say, after the lapse of the said ten " days, the said parties of the second part may foreclose " this mortgage for the whole of said notes, whether due " and payable or not on taking up the same."

Record, pp. 16, 17, and 18.

On the 4th day of May, 1876, one of the five thousand dollar notes—the last to fall due, and the only one then remaining unpaid—went to protest for want of payment. Notice of this protest was duly served on Bendey, but he refused and neglected to pay the note. On the 23d of October, 1876, the payee, Thomas W. Edwards, sued the endorsers, Smith & Harris, for the amount of the note, and interest. During the pendency of this suit, to wit, February 10, 1877, Smith & Harris paid the note and accumulated interest and the costs of the suit, and the latter was discontinued.

September 5, 1877, Smith & Harris assigned the mortgage and note to Townsend and Brigham.

The bill of complaint, as amended, sets forth *inter alia* the making of the notes by Bendey and their endorsement by Smith & Harris; the making, execution, and delivery of the mortgage " to secure said Samuel L. Smith and William

" Harris for their endorsement of said promissory notes ;" that the mortgage was upon the express condition that the same should cease and be null and void if Bendey should pay or cause to be paid the notes when they became due, and save and keep harmless said Smith & Harris of and from all costs and damages arising from or on account of said endorsements ; that Bendey failed to pay the note in question when it became due, and the same was protested ; that subsequently the payee sued Smith & Harris to collect the note and interest, and they paid the same, including costs of suit ; that the mortgage provided that in case proceedings be taken to foreclose said mortgage in chancery the complainants were authorized to deduct from the proceeds of the sale the sum of one hundred dollars as a solicitor's fee ; and the bill prays that the mortgagors may come to a fair and just account touching the amount due the complainants upon said promissory note and indenture of mortgage thereinbefore mentioned and set forth, and that they should be decreed to pay forthwith to the complainants the amount that should be found due thereon, the interest, costs, and charges sustained by said complainants, and for general relief.

The answer to the amended bill admits that the note in question was made and delivered and endorsed as set out in the bill ; admits the execution and delivery of the mortgage, " *for the purpose of securing the payment of said note* " (*among others*) *and of indemnifying said Smith &* " *Harris upon their said endorsement ;*" denies that Bendey failed to pay the note when it fell due, and that the endorsers paid the same, but alleges that if the note was paid by Smith & Harris it was with money in their hands belonging to said Bendey, or that he soon afterwards reimbursed them for any payments made thereon, whereby they were wholly indemnified and the mortgage became void.

ARGUMENT.

1. The issue thus made up by the pleadings is purely one of fact. Did Smith & Harris pay the note and interest and costs, and if so, was such payment made from money in their hands belonging to Bendey, or did he afterwards indemnify them by reimbursing what they had paid?

The evidence is conclusive that the endorsers paid the note and interest from their own funds, and were never reimbursed by Bendey.

It is claimed on the part of Bendey that he "owned an "interest in the steamer Ivanhoe, and at the request of "Smith & Harris sold it for $15,000 on purpose to place "them in funds to meet these notes on which they had be-"come endorsers, and they received the proceeds of this "sale, and were bound to pay the note in question."

Brief for appellant, p. 4.

It is not claimed that Smith & Harris were or could have been reimbursed in any other way. It is admitted that if they were not paid from the proceeds of the sale of the steamer, that they were not paid at all.

The note in question held by Edwards, the payee, did not fall due until May 4, 1876. The sale of Bendey's interest in the Ivanhoe was made in November, 1874, eighteen months before the note matured.

Seager's test., p. 30.

The only evidence to support the claim of appellant, that the note in question was to be paid by the sale of the Ivanhoe, is that of Bendey himself. He says he authorized Smith & Harris to make the sale; that he did this at the request of Smith, who claimed that the Edwards' paper, endorsed by Smith & Harris, was pressing on them; that but two of the notes for five thousand dollars remained unpaid

at that time, and they were to be taken up by the sale of the boat, and that afterwards he understood the notes were so paid.

Bendey's test., p. 34.

But Mr. Smith testifies that there was no agreement or arrangement whatever in regard to the note in dispute. That he never had any conversation with Bendey agreeing on the part of himself or his firm to pay the note. On the contrary, he had talked with Bendey several times about his (Bendey's) ability to meet this note, expressing anxiety on account of the endorsement by the firm, and their liability to pay if Bendey failed. In one or two of these conversations Bendey claimed that Edwards owed him on unsettled matters enough, as he thought, to cancel the note, if he could get an equitable settlement; and the witness urged him to employ an attorney or accountant to go over the matters between himself and Edwards, and have them settled so as to apply on the note. In none of these conversations did Bendey claim that Smith was to take care of the note. The conversations occurred previous to its maturity.

Smith's test., p. 41.

Harris testifies that Smith & Harris paid the note in question out of their own money, and that neither Bendey, nor any one for him, ever paid any part of it.

Harris' test., p. 29.

Jas. H. Seager, an employé of Smith & Harris from November, 1872, to July, 1875, testifies he was present when the note was paid or settled by the firm; that it was paid by Edwards assuming a portion of a judgment owned by Smith & Harris, and the latter giving their notes for the balance. This witness closed up the sale of Bendey's interest in the Ivanhoe to Edwards. The consideration was $15,000, which

Edwards paid by surrendering that note of Bendey's for $5,000, which fell due May 4, 1875, (the note in question falling due May 4, 1876,) and by giving his own notes for $10,000. These latter were credited up to Bendey in his account with Smith & Harris at their face, and Bendey notified of this by statement of account sent him.

Seager's test., p. 30.
Exhibit D, p. 21.

This is corroborated by witnesses:
Rich'd M. Hoar, pp. 31 and 32,
Graham Pope, pp. 32, 33, and 37,
J. W. Rice, pp. 36 and 37.

The testimony of these witnesses, taken in connection with the facts that the Ivanhoe was sold a year and a half before the note in question was due, and hence before the payee could have pressed for payment: that another note of Bendey's was surrendered by Edwards on the sale of the vessel and Bendey secured credit with Smith & Harris for $10,000—the balance of the purchase-money—most effectually disposes of Mr. Bendey's claim that Smith & Harris were reimbursed for their expenditure in paying the note.

2. But counsel contends that if Smith & Harris paid the note from their own funds, and without any special arrangement with Bendey, that payment extinguished the note, and the only remedy remaining to the endorsers was to sue Bendey for money paid, "or to foreclose the mortgage for a "breach of the indemnity clause, viz: 'Shall save and keep "'harmless the said parties of the second part of and from "'all costs and charges arising from or on account of said "'endorsement, then these presents shall cease and be null "'and void.'"

Admitting, *pro argumento*, that counsel is right in this

position, yet the pleadings and proofs are sufficient to sustain the decree.

The bill of complaint specifically sets out this indemnity clause; alleges that inasmuch as the endorsers were compelled to pay the note with costs at the suit of Edwards, they were not held harmless, but said condition of the mortgage was forfeited.

Amendment to bill, p. 8.

The answer admits that the mortgage was made to secure the payment of the note, "*and of indemnifying said Smith "& Harris upon their said endorsement.*"

Answer, p. 9.

Thus, by the pleadings, the question of the breach of this indemnity clause of the mortgage was put fairly in issue. The proofs furnished the measure of damages, being the amount paid by Smith & Harris on the note.

Another provision of the mortgage was that if the note was not paid in the manner and at the place specified, the mortgagees might resort to their security.

See Mortgage, p. 17.

It can make no difference, then, in the result of the suit whether the note be considered as an existing outstanding obligation against the mortgagors, or the mortgagees claim their remedy under the general indemnity clause, which provides they shall be held harmless, &c. The decree in either case must be the same.

3. Appellants do not seem to rely with any great degree of confidence on the contention that Smith & Harris were reimbursed, or provided with funds for the payment of the note, by the sale of the Ivanhoe, nor upon the other point, that the note was extinguished by payment to Edwards. But they do urge strenuously, as their third point, that

Smith & Harris, having paid the note, with the accrued interest and costs, and entered the same as a debit in their account with Bendey, the note is not only extinguished, but the mortgage discharged.

The point is not well taken. As a matter of book-keeping, the amounts paid by them were entered on their books as additional indebtedness to them on the part of Bendey. They apprised Bendey of this amount in a separate statement. (Exhibit G, p. 23.) This was no waiver of their security. There was no intention on the part of Smith & Harris to release their security. They retained the note. Bendey did not ask a discharge of the mortgage.

But even had they given up the note to the maker, accompanied with a receipt in full, acknowledging satisfaction of the debt, it would not be such conclusive evidence of a discharge of the mortgage as to defeat title under it, it being competent for the mortgagee to explain the transaction.

The Kimball, 3 Wall., 37.
Perkins *v.* Pitts, 11 Mass., 125.
Porter *v.* Hill, 9 *Ib.*, 34.
Parsons *v.* Wells, 17 *Ib.*, 419.
Howe *v.* Lewis, 14 Pick., 329.
Newburgh Bank *v.* Bigler, 83 N. Y., 51.

Changing the evidence of a debt, or the form of such evidence, does not discharge the lien on land mortgaged for the payment of the debt.

Thus where the old notes are taken up and new ones given in lieu thereof, even where the latter embrace other indebtedness than that secured by the mortgage, the lien is not waived.

Franklin *v.* Cannon, 1 Root, 500.
Elliott *v.* Sleeper, 2 N. H., 525.
Davis *v.* Maynard, 9 Mass., 242.
Pomeroy *v.* Rice, 16 Pick., 22.
Darst *v.* Bates, 95 Ill., 493.

An indemnity mortgage, conditioned to save the mortgagee harmless, and to pay the note on which he is surety, was held to cover a liability incurred by the mortgagee jointly with the mortgagor for money borrowed to pay the first note, and with which it was paid.

Nesbit *v.* Worts, 37 Ohio St., 378.

In Burroughs *v.* United States, (2 Paine, 569,) the Court held that a mortgage given solely for the purpose of indemnifying the mortgagee against a bond executed by him as surety will be considered, by equity, as a trust created for the better protection of the debt and will be applied to the purpose intended.

In the case at bar, if Smith & Harris, after having taken up the endorsed note, had sued Mr. Bendey at law on all his indebtedness to them, including both the secured and unsecured claims, and taken a single judgment therefor, and the execution issued on such judgment had been satisfied in part only, yet a court of equity would apply the moneys received on the execution to extinguishment of that portion of their claim not protected by the mortgage, and held their lien good for the balance.

Field *v.* Holland, 6 Cranch, 8.

Williams *v.* Reed, 3 Mass., 405.

In Williams *vs.* Reed the creditor not only changed the form of his secured claim by putting it into judgment, but he mingled it in the judgment with items of indebtedness which were unsecured. Yet the Court held he had not waived his right under the mortgage.

It will thus be seen that the rule in equity which protects the rights of the mortgagee to his lien is much stronger than we need to claim in this case.

There is in the record absolutely nothing on which to claim that the note was extinguished and the mortgage dis-

charged, except the fact that the note itself has an endorsement upon it that it was paid in full by Smith & Harris, and the additional fact that the amount thus paid was carried into the account of Bendey and included with other charges in said account.

Is this sufficient? The note was paid by the endorsers to the payee.

Such payment does not extinguish the note. The endorser's liability alone is extinguished. *The note remains as a valid claim against the maker, and may be sued upon at once by the endorser and a recovery had.*

The fact of payment by the endorser being entered upon the note is of no special significance.

Such payment might be proved by parol. The mode of proof is immaterial. Was the note paid by the endorser? If so, the maker must respond. The note still subsists in the hands of the endorser as a valid obligation against the maker. Neither it nor the mortgage is discharged by the entry in the account. There is nowhere in the record any proof that it was agreed or understood by the parties that the note should be regarded as paid upon its being carried into the account. There is no proof that there was any balance in the account in favor of Bendey at any time after February 10, 1877, when the endorsers paid the note. There is, therefore, no ground for this Court to make the application of payments for the parties and to apply the rule of the leading case of Field *v.* Holland that the Court will apply the payments to debts not secured or of which the security is the most precarious.

The charge was made in the account as a mere matter of book-keeping, and for the convenience of having a ready means of ascertaining the true balance due to either party upon all their business transactions. It has that effect, and nothing more. It was never heard of that such a charge in

a running account was an extinguishment of the note or a discharge of the mortgage. No such case has been found, or can be found. Courts are not astute to find reasons for holding that a mortgage lien has been discharged or destroyed when in fact the debt has not been paid; but they have been astute in holding that the lien is preserved when in fact the debt has not been paid, as the cases already cited show.

4. It is claimed that there is error in the decree from the fact that the Court allowed a solicitor's fee of $100 provided for in the mortgage.

The mortgage provides that sum shall be deducted from the proceeds of the sale of the mortgaged premises as a solicitor's fee should any proceedings be taken to foreclose the mortgage in chancery.

The laws of Michigan provide for the foreclosure of mortgages by advertisement and sale, as well as by bill in chancery.

The question of the validity of attorney fees provided for in mortgages was first considered by the Supreme Court of that State in Sage *v.* Riggs, (12 Mich., 313.) There the Court held that the provision in a mortgage that the mortgagee on sale of premises was empowered to retain from the proceeds thereof the amount due her "rendering the surplus "moneys, if any there be, to the said parties of the first part, "their heirs, executors, or administrators, after deducting "the costs and charges of such vendue and sale aforesaid, "and also $100 as an attorney fee should any proceedings "be taken to foreclose this indenture," as applying to foreclosures, "by advertisement and sale of the mortgaged prem-"ises, *and not a foreclosure in equity*, of which no mention "is made in the power or in any part of the mortgage. I "lay no stress on the word *attorney*, as it is not necessary to "employ one to execute the power."

In this language of the Court we find an implication that a provision in a mortgage for the payment of a solicitor's fee in case of proceedings had to foreclose in a Court of Chancery, would be held valid.

In Myer *v.* Hart, (40 Mich., 517,) it was decided that an attorney fee provided for in a mortgage could not be collected in a statutory foreclosure, unless an actual sale is made, and expressing doubt whether such provision can be enforced in any event in that form of foreclosure.

In the cases of Louder *v.* Burch, (47 Mich., 111 ;) Bean *v.* Truax, cited as Gordon *v.* Cook by mistake in counsel's brief, (47 Mich., 252,) and Vosburgh *v.* Lay, (45 Mich., 455,) given by counsel in support of his point, are all cases of statutory foreclosure.

In the case of Botsford *v.* Botsford, (49 Mich., 29 and 31,) the Court refused to allow the attorney fee to be taxed in a chancery foreclosure, but the provision of the mortgage is not given. The presumption is that it was in the same form as the provision considered in Sage *v.* Riggs. That is, the mortgage itself only provided for an attorney fee in such form as to be made applicable to a statutory foreclosure.

We find no Michigan decisions disallowing a solicitor's fee in a chancery foreclosure where the mortgage made specific provision for one as in this case. We take it there are no such decisions, or the eminent counsel for the appellants would have cited them.

We know it is the practice of some of the Circuit Court judges of the State to provide for the payment of such fees in decrees of foreclosure where they are specifically authorized in the mortgage.

However, if the Court below erred in this regard, this Court will modify the decree to that extent, and not put the litigants to further expense by returning the case. This Court will render the decree that should have been rendered

in the Court below, as expressly authorized by the 24th section of the judiciary act.

5. It is claimed by counsel for appellants that there was no personal covenant on the part of Bendey either to pay the note or indemnify Smith & Harris, and that the decree is therefore erroneous in ordering him to pay any deficiency that may exist after the mortgaged premises are exhausted.

This proposition cannot be maintained. The note not being extinguished, as we have endeavored to show, it should be construed together with the mortgage; and thus construed, it is clear that there was a personal obligation to pay, and a personal obligation to indemnify.

The note creates the obligation to pay, and the mortgage the obligation to indemnify.

The decree is strictly correct; it is in accordance with the 92d Rule adopted by this Court to regulate the practice of courts of equity of the United States.

We ask that it may be affirmed.

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